APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1322

CAROLYN BRADLEY, *et al.*,

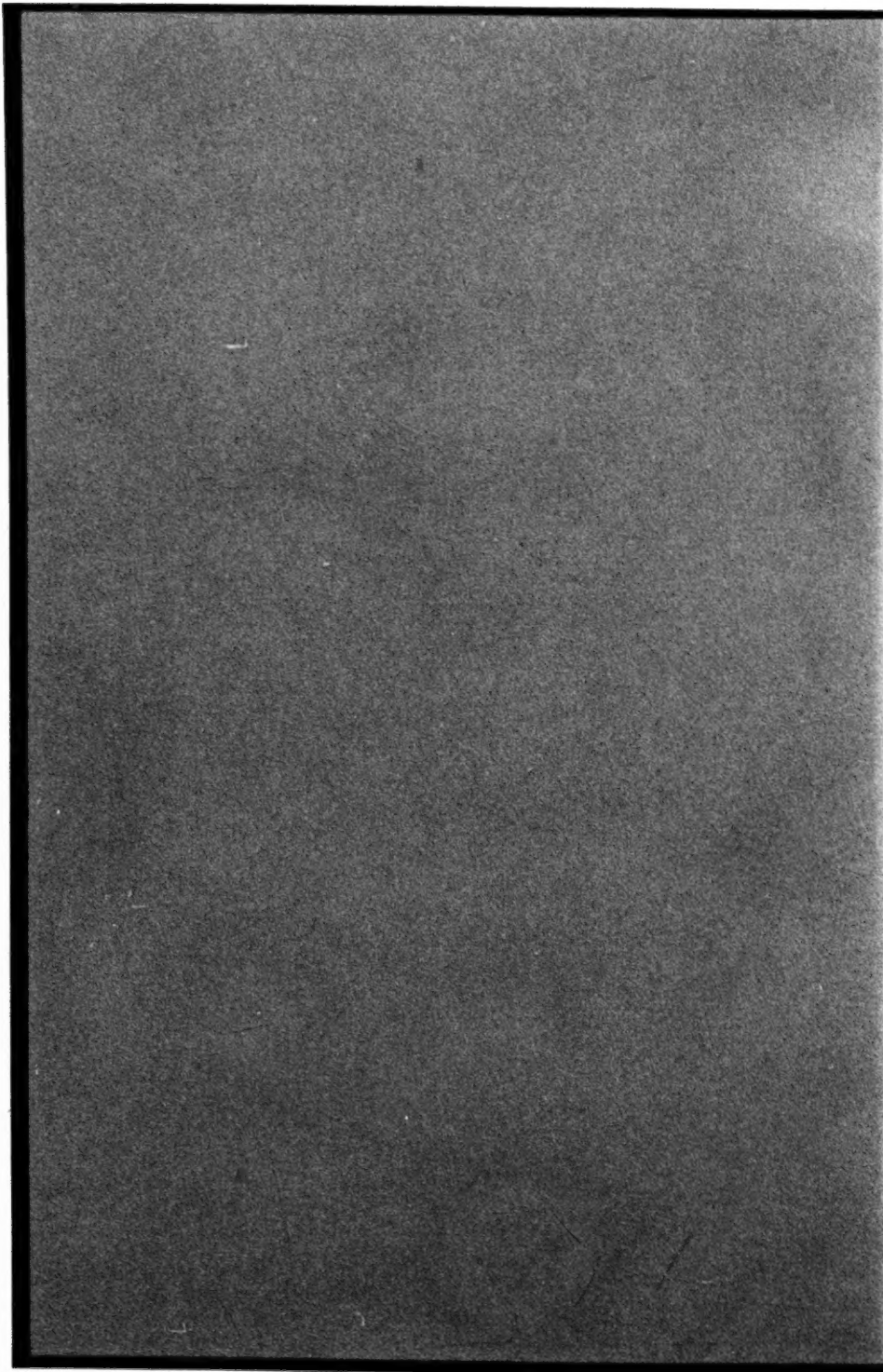
Petitioners,

—v.—

THE SCHOOL BOARD OF THE CITY OF RICHMOND, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 29, 1971
CERTIORARI GRANTED JUNE 11, 1973



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INDEX

Chronological List of Relevant Docket Entries

September 5, 1961	Complaint filed.
March 30, 1966	School Board's desegregation plan and Order approving plan filed.
March 10, 1970	Motion for Further Relief filed by Plaintiffs.
March 12, 1970	Order that School Board advise the Court within ten days if public schools being operated in accordance with constitutional requirements.
March 19, 1970	Statement of School Board filed.
March 31, 1970	Hearing.
April 1, 1970	Order that Plaintiffs' Motion for Further Relief be granted; order of 3-30-66 is thereby vacated; School Board to file before 5-11-70 a plan for unitary system.
May 11, 1970	Report and Motion of School Board filed by its attorneys.
June 19-20, 1970	Hearing.
June 25-26, 1970	Hearing.
June 26, 1970	Order disapproving plan of School Board; Board to submit plan and hearing set for August 7, 1970.
July 2, 1970	Motion of Plaintiffs for attorneys' fees, etc.
July 23, 1970	School Board Interim Plan filed.

Chronological List of Relevant Docket Entries

July 23, 1970	Motion for leave to file third party complaint against School Board of Chesterfield County and School Board of Henrico County filed by City of Richmond.
August 7, 1970	Motion by School Board to file third party complaint against School Boards of Chesterfield and Henrico Counties.
August 7, 1970	Hearing.
August 17, 1970	Memorandum of the Court filed; Order that School Board's plan filed 7-23-70 be approved for term commencing 8-31-70; Counsel for Plaintiffs and School Board to confer as to payment of counsel fees and costs and report to Court within 45 days.
November 18, 1970	Hearing.
December 5, 1970	Order directing joinder of parties needed for just adjudication.
December 9, 1970	Plaintiffs' motion for implementation of Plaintiffs' plan for second semester filed.
January 15, 1971	School Board plans for desegregation filed.
January 29, 1971	Memorandum and Order denying Plaintiffs' motion for implementation of Plaintiffs' plan.
February 5, 1971	Notice of Appeal from Order of January 29, 1971 filed by Plaintiffs.

Chronological List of Relevant Docket Entries

March 4, 1971	Hearing.
April 5, 1971	Memorandum and Order of Court approving School Board Plan III.
April 16, 1971	Hearing.
April 23, 1971	Hearing.
May 17, 1971	Hearing.
May 26, 1971	Memorandum and Order filed directing School Board to pay to Plaintiffs' counsel $56,419.65 from 3-10-70 through 1-29-71.
June 17, 1971	Motion for contempt filed by Plaintiffs.
June 18, 1971	Notice of Appeal from May 26 Order filed by School Board.
June 21, 1971	Hearing; Motion for contempt denied.
June 22, 1971	Order and Memorandum filed directing payment of counsel fees and denying Board's motion for stay.

Amended Complaint

(Filed January 4, 1962)

I

1. (a) Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1331. This action arises under Article 1, Section 8, and the Fourteenth Amendment of the Constitution of the United States, Section 1, and under the Act of Congress, Revised Statutes, Section 1977, derived from the Act of May 31, 1870, Chapter 114, Section 16, 16 Stat. 144 (Title 42, United States Code, Section 1981), as hereafter more fully appears. The matter in controversy, exclusive of interest and cost, exceeds the sum of Ten Thousand Dollars ($10,000.00).

(b) Jurisdiction is further invoked under Title 28, United States Code, Section 1343. This action is authorized by the Act of Congress, revised Statutes, Section 1979, derived from the Act of April 20, 1871, Chapter 22, Section 1, 17 Stat. 13 (Title 42, United States Code, Section 1983), to be commenced by any citizen of the United States or other person within the jurisdiction thereof to redress the deprivation under color of state law, statute, ordinance, regulation, custom or usage of rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States and by the Act of Congress, Revised Statutes, Section 1977, derived from the Act of May 31, 1870, Chapter 114, Section 16, 16 Stat. 144 (Title 42, United States Code, Section 1981), providing for the equal rights of citizens and of all persons within the jurisdiction of the United States as hereafter more fully appears.

II

2. Infant plaintiffs are Negroes, are citizens of the United States and of the Commonwealth of Virginia, and are residents of and domiciled in the political subdivision of Virginia for which the defendant school board main-

tains and operates public schools. Said infants are within the age limits of eligibility to attend, and possess all qualifications and satisfy all requirements for admission to, said public schools.

3. Adult plaintiffs are Negroes, are citizens of the United States and of the Commonwealth of Virginia, and are residents of and domiciled in said political subdivision. They are parents or guardians or persons standing *in loco parentis* of one or more of the infant plaintiffs.

4. Plaintiffs bring this action in their own behalf and, there being common questions of law and fact affecting the rights of all other Negro children attending public schools in the Commonwealth of Virginia and, particularly, in said political subdivision, and the parents and guardians of such children, similarly situated and affected with reference to the matters here involved, who are so numerous as to make it impracticable to bring all before the court, and a common relief being sought, as will hereinafter more fully appear, the plaintiffs also bring this action, pursuant to Rule 23(a) of the Federal Rule of Civil Procedure, as a class action on behalf of all other Negro children attending public schools in the Commonwealth of Virginia and, particularly, in said political subdivision, and the parents and guardians of such children, similarly situated and affected with reference to the matters here involved.

III

5. The Commonwealth of Virginia has declared public education a state function. The Constitution of Virginia, Article IX, Section 129, provides:

> "Free schools to be maintained. The General Assembly shall establish and maintain an efficient system of public free schools throughout the State."

Pursuant to this mandate, the General Assembly of Virginia has established a system of public free schools in

the Commonwealth of Virginia according to a plan set out in Title 22, Chapters 1 to 15, inclusive, of the Code of Virginia, 1950. The establishment, maintenance and administration of the public school system of Virginia is vested in a State Board of Education, a Superintendent of Public Instruction, Division Superintendents of Schools, and County, City and Town School Boards (Constitution of Virginia, Article IX, Sections 130-133; Code of Virginia, 1950, Title 22, Chapter 1, Section 22-2).

IV

6. The defendant school board, the corporate name of which is stated in the caption, exists pursuant to the Constitution and laws of the Commonwealth of Virginia as an administrative department of the Commonwealth, discharging governmental functions, and is declared by law to be a body corporate. Said school board is empowered and required to establish, maintain, control and supervise an efficient system of public free schools in said political subdivision, to provide suitable and proper school buildings, furniture and equipment, and to maintain, manage and control the same, to determine the studies to be pursued and the methods of teaching, to make local regulations for the conduct of the schools and for the proper discipline of the students, to employ teachers, to provide for the transportation of pupils, to enforce the school laws, and to perform numerous other duties, activities and functions essential to the establishment, maintenance and operation of the public free schools in said political subdivision. (Constitution of Virginia, Article IX, Section 133; Code of Virginia, 1950, as amended, Title 22.)

7. The defendant division superintendent of schools, whose name as such officer is stated in the caption, holds office pursuant to the Constitution and laws of the Commonwealth of Virginia as an administrative officer of the public free school system of Virginia. (Constitution of Virginia, Article IX, Section 133; Code of Virginia, 1950, as amended,

Title 22.) He is under the authority, supervision and control of, and acts pursuant to the orders, policies, practices, customs and usages of the defendant school board. He is made a defendant herein in his official capacity.

8. A Virginia statute, first enacted as Chapter 70 of the Acts of the 1956 Extra Session of the General Assembly, viz, Article 1.1 of Chapter 12 of Title 22 (Sections 22-231.1 through 22-232.17) of the Code of Virginia, 1950, as amended, confers or purports to confer upon the Pupil Placement Board all powers of enrollment or placement of pupils in the public schools in Virginia and to charge said Pupil Placement Board to perform numerous duties, activities and functions pertaining to the enrollment or placement of pupils in, and the determination of school attendance district for, such public schools, except in those counties, cities or towns which elect to be bound by the provisions of Article 1.2 of Chapter 12 of Title 22 (Sections 22-232.18 through 22-232.31) of the Code of Virginia, 1950, as amended. (Section 22-232.30 of the Code of Virginia, 1950, as amended.) The names of the individual members of the Pupil Placement Board are stated in the caption.

V

9. Notwithstanding the holding and admonitions in *Brown* v. *Board of Education*, 347 U.S. 483, and 349 U.S. 294, the pre-existing pattern of racial segregation in the public schools maintained and operated by the defendant school board continues unaffected except in the few instances, if any there are, in which individual Negroes have sought and obtained admission to schools other than those attended exclusively by Negroes. The defendants have not devoted efforts toward initiating nonsegregation and bringing about the elimination of racial discrimination in the public school system, neither have they made a reasonable start to effectuate a transition to a racially non-discriminatory school system, as under paramount law it is

their duty to do. Deliberately and purposefully, and solely because of race, the defendants continue to require all or virtually all Negro public school children to attend school where none but Negroes are enrolled and to require all white public school children to attend school where no Negroes, or at best few Negroes, are enrolled.

10. As matters of routine, every white child entering school for the first time is initially assigned to and placed in a school which predominantly, if not exclusively, is attended by white children; or if otherwise assigned, then, upon request of the parents or guardians, such child is transferred to a school which, being attended exclusively or predominantly by white children, is considered as a school for white children. Upon graduation from elementary school, every white child is routinely assigned to a high school or junior high school which is predominantly, if not exclusively, attended by white children. Similarly, and with few if any exceptions, Negro children entering school for the first time are initially assigned to a school which none but Negroes attend upon their graduation from elementary school they are routinely assigned to a high school or to a junior high school which none but Negroes attend.

11. To avoid the racially discriminatory result of the practice described in the paragraph next preceding, the Negro child, or his parent or guardian for him, is required to make application for transfer from the school which none but Negroes attend to a school specifically named. In acting upon such application for transfer from the all-Negro school, the defendants take into consideration certain criteria which defendants do not consider when making initial enrollments or placements in any school other than the initial placement or enrollment of a Negro child in a school which white children attend. If such criteria are not met, the application for transfer is denied. For example, if the home of the applicant is closer to the school to which he has been assigned than to the school to which

transfer is sought, the application is denied notwithstanding the fact that the latter school is attended by white children similarly situated with respect to residence. For further example, if intelligence, achievement or other standardized test scores or other academic records of the applicant do not compare favorably with the best or the better of similar scores or records of children attending or assigned to the school which the applicant seeks to attend, the application is denied notwithstanding the fact that many white children attending said school have lower scores or lower academic records than the applicant has.

VI

12. Timely application was made to the defendants for the admission of each infant plaintiff to a public school in said political subdivision heretofore and now attended exclusively or predominantly by white persons. The refusal of such application was made known to the parent, guardian, of each infant plaintiff by letter from the Pupil Placement Board indicating the placement of the child in a certain school, which school is one attended exclusively by Negroes. In the case of each infant plaintiff, a written protest of such placement was made to the Pupil Placement Board within the time prescribed by statute; whereupon the Pupil Placement Board scheduled a hearing upon said protest. In the case of each infant plaintiff, but only to the extent that such details can now be stated with certainty, the attached "Schedule 'A' " sets out: (1) the name of the infant plaintiff, (2) the school assignment to which is sought, (3) the date of the letter from the Pupil Placement Board and the name of the all-Negro school in which the infant plaintiff was placed, (4) the reason assigned for denial of the application, and (5) the date and place of the hearing on the protest of the placement. Notwithstanding the said protest and hearing thereon, the Pupil Placement Board confirmed its placement previously made in the case of each of the infant plaintiffs.

13. But for the deliberate purpose of the defendants to avoid performance of their duty as hereinabove mentioned in paragraph 9 hereof, plaintiffs would have had no need to apply for attendance at certain schools. But for the fact that the defendants intended to maintain the racially segregated pattern of public schools through the routine practices described in paragraph 10 hereof, the applications made on behalf of the infant plaintiffs would have been granted. Solely by reason of the practices, customs, usages and calculated result thereof as mentioned and complained of in paragraph 11 hereof, the placement of each infant plaintiff in an all-Negro school was confirmed, even after protest. Unless and until the defendants, as a result of injunction or otherwise, will cease and desist from the practice and usage mentioned in paragraph 11, applications and protests will be vain and futile when made on behalf of any Negro child situated as the infant plaintiffs are with regard to residence or with regard to intelligence, achievement or other standardized test scores or other academic records.

VII

14. The refusal of the defendants to grant the requested assignments, viewed in the light of the refusal of the defendants to bring about the elimination of racial discrimination in the public school system and to make a reasonable start to effectuate a transition to a racially non-discriminatory system, constitutes a deprivation of the liberty of the infant plaintiffs as well as all other Negro public school children within said political subdivision and a denial of their right to the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States, and a denial of rights secured by Title 42, United States Code, Section 1981.

15. Plaintiffs and those similarly situated and affected are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the policy,

practice, custom and usage and the actions of the defendants herein complained of. They have no plain, adequate or complete remedy to redress the wrongs and illegal acts herein complained of other than this complaint for an injunction. Any other remedy to which plaintiffs and those similarly situated could be remitted would be attended by such uncertainties and delays as would deny substantial relief, would involve a multiplicity of suits, and would cause further irreparable injury and occasion damage, vexation and inconvenience.

VIII

WHEREFORE, plaintiffs respectfully pray:

(A) That this Court enter an interlocutory and a permanent injunction restraining and enjoining defendants, and each of them, their successors in office, and their agents and employees, forthwith, from denying infant plaintiffs, or either of them, solely on account of race or color, the right to be enrolled in, to attend and to be educated in, the public schools to which they, respectively, have sought admission;

(B) That this Court enter a permanent injunction restraining and enjoining defendants, and each of them, their successors in office, and their agents and employees from any and all action that regulates or affects, on the basis of race or color, the initial assignment, the placement, the transfer, the admission, the enrollment or the education of any child to and in any public school;

(C) That, specifically the defendants and each of them, their successors in office, and their agents and employees be permanently enjoined and restrained from denying the application of any Negro child for assignment in or transfer to any public school attended by white children when such denial is based solely upon requirements or criteria which do not operate to exclude white children from said school;

(D) That the defendants be required to submit to the Court a plan to achieve a system of determining initial assignments, placements or enrollments of children to and in the public schools on a non-racial basis and be required to make periodical reports to the Court of their progress in effectuating a transition to a racially non-discriminatory school system; and that during the period of such transition the Court retain jurisdiction of this case;

(E) That defendants pay to plaintiffs the costs of this action and attorney's fees in such amount as to the Court may appear reasonable and proper; and

(F) That plaintiffs have such other and further relief as is just.

SCHEDULE "A" TO COMPLAINT THE SCHOOL BOARD OF THE CITY OF RICHMOND, VA., ET AL, DEFENDANTS

1	2	3	4	5
Infant Plaintiff	*Desired Assignment*	*Date of Letter From Pupil Placement Board and Placement Made Thereby*	*Reason Assigned For Denial*	*Date and Place Of Hearing on Protest*
Carolyn Bradley	Chandler Jr. High	July 17, 1961 Benjamin Graves	Lack of academic qualifications	August 18, 1961 Richmond, Virginia
Michael Bradley	Chandler Jr. High	July 18, 1961 Benjamin Graves	Lack of academic qualifications	
Rosalind Dobson	Chandler Jr. High	July 18, 1961 Benjamin Graves	Lack of academic qualifications	August 18, 1961 Richmond, Virginia
Morgan N. Jackson	John Marshall High	July 18, 1961 Maggie Walker High	Distance from school	August 18, 1961 Richmond, Virginia
Bruce W. Johnson	Chandler Jr. High	July 18, 1961 Benjamin Graves	Lack of academic qualifications	August 18, 1961 Richmond, Virginia
John Edward Johnson, Jr.	Chandler Jr. High	July 18, 1961 Benjamin Graves	Lack of academic qualifications	August 18, 1961 Richmond, Virginia
Phyllis Antoinette Johnson	Chandler Jr. High	July 18, 1961 Benjamin Graves	Lack of academic qualifications	August 18, 1961 Richmond, Virginia
Robert S. Meyers	Chandler Jr. High	July, 1961 Benjamin Graves	Lack of academic qualifications	August 18, 1961 Richmond, Virginia
Daria A. Cameron	Chandler Jr. High	July 18, 1961 Benjamin Graves	Lack of academic qualifications	August 18, 1961 Richmond, Virginia
William Dunbar Quarles, Jr.	Chandler Jr. High	July, 1961 Benjamin Graves	Lack of academic qualifications	August 18, 1961 Richmond, Virginia
Lemuel Wimbish, Jr.	Chandler Jr. High	July 18, 1961 Benjamin Graves	Lack of academic qualifications	August 18, 1961 Richmond, Virginia

Answer of School Board

(Filed June 21, 1962)

Answer of the School Board of the City of Richmond and H. I. Willett, Division Superintendent of Schools of the City of Richmond

For their joint and several answers in this case the defendants, The School Board of the City of Richmond and H. I. Willett, Division Superintendent of Schools of the City of Richmond, answer and say:

1. These defendants do not deny the jurisdiction stated in paragraph 1 of the amended bill of complaint, but they deny that any action of theirs, or either of them, has deprived the plaintiffs, or any of them, under color of state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or any amendment thereto, or any act of Congress, as alleged in paragraph 1 of the amended bill of complaint.

2. These defendants deny the allegations of paragraphs 2, 3 and 4 of the amended bill of complaint.

3. These defendants admit the allegations of paragraph 5 of the amended bill of complaint.

4. These defendants admit the allegations of paragraph 6 of the amended bill of complaint, except that they say that while The School Board of the City of Richmond is empowered to provide school buildings, title to such property in the City of Richmond is vested in the City of Richmond as provided for by § 22-94 of the Code of Virginia, and only such school buildings are provided, maintained and operated in the City of Richmond as are authorized by the City Council to be provided, maintained and operated, and at such places as are designated and within the limitations of funds provided by the Council for the purpose in the exercise of its discretion; and except that the performance of the other function alleged in paragraph 6 are subject to appropriation of funds for such purposes by the City Council in the exercise of its discretion.

5. These defendants admit the allegations of paragraph 7 of the amended bill of complaint, except that they say that the defendant, H. I. Willett, as Division Superintendent of Schools is under the authority, supervision and control, and acts pursuant to, the orders, policies, practices, customs and usages of the defendant, The School Board of the City of Richmond, only to the extent that there is no conflict with the provisions of §§ 22-36 and 22-97 and with §§ 22-232.1 through 22-232.17 of the Code of Virginia, as amended by chapter 500 of the Acts of Assembly of 1958, known as the Pupil Placement Act, or with any other statute of the Commonwealth of Virginia.

6. These defendants admit the allegations of paragraph 8 of the amended bill of complaint, except that they say: (a) that § 22-232.1 of the Code of Virginia, which is a part of the Pupil Placement Act, has divested these defendants of all power and authority "now or at any future time" to determine the school to which the plaintiffs and any other child shall be admitted; (2) that article 1.2 of Chapter 12 of Title 22 (§§ 22-232.18 through 22-232.31) of the Code of Virginia is not applicable or operative in the City of Richmond because the defendant, The School Board of the City of Richmond, has not recommended to the Council or governing body of the City of Richmond that the provisions of article 1.2 of chapter 12 of Title 22 of the Code of Virginia be made applicable or operative in the City of Richmond, nor has the Council or governing body taken any action with respect thereto; (c) that it is within the uncontrolled discretion of the defendant, The School Board of the City of Richmond, and the Council or governing body of the City of Richmond whether the provisions of article 1.2 of chapter 12 of Title 22 of the Code of Virginia shall be applicable or operative in the City of Richmond; and (d) that these defendants are wholly without power to admit the plaintiffs and any other child to a public school in the City of Richmond, except in the sense that they may per-

form purely ministerial acts when clearly authorized by law so to do.

7. These defendants deny all of the allegations of paragraphs 9 through 15 of the amended bill of complaint; and say: (a) that these defendants have been divested of all power and authority "now or at any future time" to determine the school to which the plaintiffs and any other child shall be admitted; (b) that these defendants are wholly without power to admit the plaintiffs and any other child to a public school in the City of Richmond, except in the sense that they may perform purely ministerial acts when clearly authorized by law so to do; and (c) that these defendants have done no act that has deprived the plaintiffs, or any of them, or any other child under color of state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or any amendment, thereto, or any act of Congress.

FURTHER ANSWER

Further answering, these defendants jointly and severally say the purpose of the bill of complaint is to obtain the entry of an order which will enjoin and restrain the enforcement, operation and execution of the Pupil Placement Act, by restraining the action of officers of the State of Virginia in the enforcement and execution of the statute, and of an order or orders made by an administrative board or commission acting under such statute, upon the ground of the unconstitutionality of the statute. Under the provisions of Title 28 U.S.C.A., section 2281, such an injunction cannot be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under Title 28, U.S.C.A., section 2284.

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Excerpts from Transcript of Proceedings of March 30, 1966

THE CLERK: Civil Action 3353 Caroline Bradley and Michael Bradley, et al. v. The School Board of the City of Richmond, Virginia, et al.

Henry L. Marsh, III represents the plaintiff and Mr. Henry T. Wickham represents the defendant.

Counsel ready?

MR. MARSH: Ready for the plaintiff.

MR. WICKHAM: Yes, sir.

If Your Honor please, at this time I would like to file a resolution of the School Board, City of Richmond, that was adopted today, March 30th, attached to which is a desegregation plan for the Richmond Public School System.

I might say that the plaintiffs and the defendants have agreed to this plan and accordingly would ask permission to file it now and present to the Court an order permitting that it be filed and approving the plan as filed.

THE COURT: Is this the same as the draft that was furnished?

MR. WICKHAM: The same as I left with your secretary on Monday morning, I believe.

THE COURT: Well, I have studied that.

Mr. Marsh, do you wish to be heard on this?

MR. MARSH: May it please the Court, we participated in the negotiations with the school board and this plan represents the agreement that was reached as a result of several weeks of negotiations and I think that the plaintiffs are satisfied with this plan and we would like for the Court to approve it.

Excerpts from Transcript of Proceedings of March 30, 1966

THE COURT: You join in the motion?

MR. MARSH: Yes, sir.

THE COURT: Very well.

Gentlemen, in Bradley v. The School Board 382 U.S. 103 (1965) this action was remanded to this court for hearings and proceedings consistent with the opinion of the Supreme Court. The Court set the case down for hearing. In the meanwhile the parties conferred and as a result of their conferences the school board has tendered to the Court a revised plan.

The plaintiffs offered no objection to the plan and state that it meets with their approval. Accordingly, the parties being in agreement, the Court will approve the plan.

* * *

Resolution of the School Board of the City of Richmond

(Filed March 30, 1966)

BE IT RESOLVED by The School Board of the City of Richmond:

1. That the DESEGREGATION PLAN FOR THE RICHMOND PUBLIC SCHOOL SYSTEM, dated March 30, 1966, a copy of which is attached hereto, is hereby approved and adopted.

2. That this Plan and a certified copy of this resolution be submitted to the United States District Court for the Eastern District of Virginia, Richmond Division.

3. That, subject to the approval of the Court, this Plan shall be in effect for the 1966-67 school year, and each school year thereafter until changed with the approval of the Court.

Adopted:

March 30, 1966

A TRUE COPY, TESTE:

.....

Clerk of The School Board of the
City of Richmond, Virginia

Desegregation Plan for the Richmond Public School System

(Filed March 30, 1966)

Professional Personnel

The School Board of the City of Richmond recognizes its responsibility to employ, assign, promote and discharge teachers and other professional personnel of the Richmond City Public School System without regard to race or color. It further recognizes its obligation to take all reasonable steps to eliminate existing racial segregation of faculty that has resulted from the past operation of a dual system based upon race or color. In the recruitment, selection and assignment of staff, the chief obligation is to provide the best possible education for all children. The pattern of assignment of teachers and other professional staff among the various schools of the system will not be such that schools are identifiable as intended for students of a particular race, color or national origin, or such that teachers or other professional staff of a particular race are concentrated in those schools where all, or the majority, of the students are of that race.

The program to be utilized in carrying out these responsibilities includes the following:

1. The best person will be sought for each position without regard to race, and Negroes will be sought for important positions in order to demonstrate that job opportunities are available for those who meet the necessary requirements.

2. The School Board will seek to select personnel without regard to race, and will follow the policy of assigning new personnel in a manner that will work toward the desegregation of faculties. This, of course, does not mean

intentionally selecting a person of less ability to accomplish desegregation, but rather it means working toward the goal of desegregation of faculties in all schools.

3. In the recruitment and employment of teachers and other professional personnel, all applicants and other prospective employees will be informed that the City of Richmond operates a racially integrated school system and that the teachers and other professional personnel are subject to assignment in the best interest of the school system and without regard to their race or color.

4. The School Board will take affirmative steps to solicit and encourage teachers presently employed to accept transfers to schools in which the majority of the faculty members are of a race different from that of the teacher to be transferred.

5. In the process of faculty desegregation, consideration will be given to the assignment of "roving" and "special teachers".

6. In filling faculty vacancies which occur prior to the opening of each school year, preferential consideration will be given to presently employed teachers of the race opposite the race that is in the majority in the faculty at the school where the vacancy exists. In making such transfers account will be taken of the criteria utilized in approving transfers for other reasons.

PUPILS

The School Board of the city of Richmond recognizes its obligation to eliminate a dual school system in the assign-

ment of pupils. In the implementation of its present plan, the School Board recognizes that it has the responsibility to create and maintain an environment in which there is a freedom of choice based on positive information without restrictive pressures. The School Board further recognizes a responsibility to seek reasonable positive steps that are educationally sound to prevent and/or minimize the isolation of one ethnic group from contact with other groups.

The program to be utilized in carrying out these responsibilities includes the following:

1. The School Board's chief responsibility is to provide high quality education for all the children of Richmond. Sound educational goals include opportunities for white children and Negro children to associate on equal terms in the public schools as do children of various religions and national origins.

2. The pattern of assignment of teachers and other professional staff among the various schools will not be such that schools are identifiable as intended for students of a particular race, color, or national origin; or such that teachers or other professional staff of a particular race are concentrated in those schools where all or the majority of the students are of that race.

3. The School Board recognizes that any plan of desegregation must be evaluated in terms of results and the Board is taking positive steps to meet its responsibility. These steps include procedures such as the following:

(a) Where schools in close proximity to each other have significant inequality in enrollment in relation-

ship to capacity, the School Board recognizes a responsibility to take positive steps to correct such inequities.

(b) Pupils in all schools will be acquainted with opportunities in other schools, particularly when pupils are finishing the last grade in one school and moving to another school.

(c) City-wide centers are being planned that will serve pupils from all areas of the city, and student workshops and city-wide institutes and seminars have been conducted and plans are being made for expansion on a city-wide or city area basis.

4. If the steps taken by the School Board do not produce significant results during the 1966-67 school year, it is recognized that the freedom of choice plan will have to be modified with consideration given to other procedures such as boundary lines in certain areas.

Construction

The program for construction of new schools or additions to existing schools will not be designed to perpetuate, maintain, or support racial segregation.

Special Programs

The same principles (where applicable) pertaining to pupils, professional staff, and construction for regular day schools shall also be applied to all special programs administered by the School Board such as programs of adult education, education of the handicapped children, and education of the economically and culturally disadvantaged children.

March 30, 1966

Order

(Filed March 30, 1966)

On motion of the defendants, and with the consent of the plaintiffs, by counsel, leave is granted the defendants to file their DESEGREGATION PLAN FOR THE RICHMOND PUBLIC SCHOOL SYSTEM dated March 30, 1966 and a certified copy of the resolution approving and adopting the Plan, which resolution was adopted on March 30, 1966, and said Plan and copy of the resolution are filed.

Upon consideration whereof, it is ADJUDGED, ORDERED and DECREED:

1. That the DESEGREGATION PLAN FOR THE RICHMOND PUBLIC SCHOOL SYSTEM dated March 30, 1966, is approved.

2. That the School Board shall put the Plan into effect for the 1966-67 school year.

3. That the Court retain jurisdiction of this action.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

March 30, 1966.

Motion for Further Relief

(Filed March 10, 1970)

Plaintiffs move that, in light of the opinions of the United States Supreme Court in *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968), *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969) and *Carter* v. *West Feliciana Parish School Bd.*, No. 944 (O.T. 1969, January 14, 1970), and also in the light of recent decisions of the United States Court of Appeals for the Fourth Circuit, the Court require the defendant school board forthwith to put into effect a method of assigning children to public schools and to take other appropriate steps which will promptly and realistically convert the public schools of the City of Richmond into a unitary non-racial system from which all vestiges of racial segregation will have been removed; and that the Court award a reasonable fee to their counsel to be assessed as costs.

/s/ M. Ralph Page

/s/ Ronald D. Ealey

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Order

(Filed March 12, 1970)

It appearing to the Court that the plaintiffs have moved for further relief in this cause, and to the end that the Court may properly schedule its docket, and deeming it proper so to do,

It is ORDERED that the defendants shall, within ten days from this date, advise the Court if it is their position that the public schools of the City of Richmond, Virginia are being operated in accordance with the constitutional requirements to operate unitary schools as enunciated by the United States Supreme Court.

It is further ORDERED that in the event the defendants cannot properly assert that the operation of the public schools of the City of Richmond is in compliance as aforesaid, then they shall advise the Court the amount of time they deem will be required to submit a plan for the operation of the public school system of the City of Richmond which they feel will bring them in compliance with the requirements of the Constitution.

Let the Clerk send copies of this order to all counsel of record.

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

March 12, 1970.

Statement of Defendant Richmond School Board

(Filed March 19, 1970)

The defendants aver and state as follows:

1. They have operated the school system and educational facilities of the City of Richmond to the best of their knowledge and belief in accordance with the decree of this Court entered on the 30th day of March, 1966.

2. The implementation of the said decree permits any child to attend any school located within the City so long as the said school provides instruction in the grade to which the child wishes to attend.

3. They have been advised that the public schools of the City of Richmond are not being operated as unitary schools in accordance with the most recent enunciations of the Supreme Court of the United States.

4. They have requested the Department of Health, Education and Welfare to make a study and recommendation that will ensure the operation of the unitary school system in continuing compliance with the decisions of the United States Supreme Court.

5. The Department of Health, Education and Welfare has agreed to undertake the aforesaid study and recommendation involving the Richmond Public Schools and that its findings will be made available on or about May 1, 1970.

6. They will submit a plan for the operation of the public school system of the City of Richmond not later than May 11, 1970, which they feel will bring them in compliance with the requirements of the Constitution.

THE SCHOOL BOARD OF THE CITY OF RICHMOND, VIRGINIA, et al.

Excerpts from Transcript of Proceedings of March 31, 1970

[3] The Clerk: Civil Action 3353, Carolyn Bradley, and Michael Bradley, et al., versus the School Board, City of Richmond.

Mr. S. W. Tucker represents plaintiffs.

Mr. Henry T. Wickham represents defendant.

The Court: All right, gentlemen.

Yes, Mr. Ely, how are you?

Mr. Ely: May it please the Court, I would like to present to the Court Mr. Norman J. Chachkin, member of the Arkansas bar. He has not formally qualified to practice in this court, but he meets all of the qualifications for such, and at a later date those qualifications will be memoralized in writing.

This is Mr. Chachkin.

The Court: Delighted to have you with us, Mr. Chachkin.

Mr. Chachkin: Delighted to make it, Your Honor.

The Court: I asked you to appear here for a pre-trial conference for the very reasons stated, the order concerning the issue raised by plaintiffs' motion and defendant's statement filed March 19. And I want to set trial dates. I have got to get this docket straight. It is fairly obvious, [4] it seems to me without prejudging it now, and I want to treat this as a pre-trial conference, that any actions to be taken in reference to any further relief, if the plaintiffs are entitled to any further relief, are by virtue of the Alexandria case and the cases and decisions of the United States Supreme Court and this Circuit in Halifax that precludes any delay beyond the beginning of the next school term if any further relief is granted, which means that the School Board, if further relief is granted, ought to know as soon as possible where they are going.

Excerpts from Transcript of Proceedings of March 31, 1970

I would imagine it must be quite a task to make any rearrangements.

Now, what I want to know, and I want to know it just as straight as a die, without any hesitation, and I direct myself to counsel for the School Board, is the City of Richmond today, the School Board, City of Richmond, today operating a unitary school system where there are neither black nor white schools, as required by law? And I don't want any answer, please, that tells me they are advised one way or the other. I want to know whether there is any issue about it. If there is, they certainly have a right to make an issue of it, if they can honestly do so. I want to set it down for hearing.

If there is no issue then I want to know why I can't rule that the plaintiff is forthwith entitled to further [5] relief and enter a mandatory injunction against the defendants for operating a system contra to the law.

Now, are they or aren't they? Without "they are advised or they are not advised." What is their position? That is all I want to know. I can't be plainer than that.

Mr. Wickham: It is the School Board's position they are not operating a unitary system.

The Court: Is it your position then that the plaintiffs under the law, without saying what relief, are entitled to further relief, Mr. Wickham?

Mr. Wickham: That is correct.

The Court: That saves the necessity of any hearing in reference to that, gentlemen. And there is no question.

I would now like to discuss the mechanics, and I think that is all it is, the mechanics as to whether or not the Court—well, the Court has now ruled that the plaintiffs are entitled to further relief based upon the very frank representation of the defendants.

Excerpts from Transcript of Proceedings of March 31, 1970

Does that put us in a position where the Court ought to enter a mandatory injunction, as is usual in this case, directing that they forthwith file a plan? When I say forthwith, I mean such time as these gentlemen tell me they think they need on that. So we can go from there. Isn't [6] that the appropriate step, the next step? Is there any objection to a mandatory injunction enjoining them to do what they are supposed to do? Doesn't that really lay it on the line to them?

Mr. Wickham: It is—we are already under an injunction, Your Honor.

The Court: Sir?

Mr. Wickham: We are already under an injunction, Your Honor.

The Court: By whom?

Mr. Wickham: By this Court.

The Court: In what regard? When was it entered? You mean to operate a freedom of choice?

Mr. Wickham: No.

The Court: You mean by the law?

Mr. Wickham: That is correct, Your Honor.

The Court: But you are not under any specific injunction so that the responsibility—

Mr. Wickham: It was a general order entered enjoining the School Board from operating a dual system of schools or operating a segregated school system back in 1964.

The Court: They have done that innocently, did it under the erroneous impression that freedom of choice was all right.

[7] Well, it is all right if it works, but it doesn't work.

Well, that order is herewith vacated. Freedom of choice. Of course it is vacated. So there is no misunderstanding. I think for their protection I best enter a mandatory in-

Excerpts from Transcript of Proceedings of March 31, 1970

junction, as I do in the usual cases, enjoining them from operating schools in any method other than in a unitary school system wherein there are no black or white schools. You all have seen the usual order.

Now, any objection to that order? Of course give them all the reasonable time. And then wait for you all to submit your plan.

You tell me how long you think it will take, Mr. Wickham, so we can set a date down for a hearing on it should there be any exception. Hopefully there wouldn't be.

Let me just say this. I think we may get some help from court decisions in the next 30 days or so. But, you know, you can't tell how long the Court of Appeals will take to decide some of these.

Mr. Wickham: We would like a hearing, if necessary, some time during the week of May 18, if the Court could arrange it during that week.

We would hope to file, as we said in our statement to the Court, our plan no later than May 11.

[8] The Court: All right, sir.

Well, that is fine. I have no trouble with that. The problem at that time, I realize it takes time, although you have had some time to be working.

Mr. Chachkin: Your Honor, plaintiffs do have some difficulty in that regard.

I think this is going to get to what the issues are likely to be when a plan is filed.

Richmond School Board has announced, it has already sought the help of HEW in drafting a plan.

The Court: But this Court is not bound by whatever they draft. But I am delighted they are getting help from anybody.

Excerpts from Transcript of Proceedings of March 31, 1970

Mr. Wickham: I might say, we are not bound too, Your Honor.

The Court: That's right.

Mr. Chachkin: No one is bound by HEW. We have particular difficulty in light of the President's statement in believing that the Department will undertake a thorough investigation of all possible remedies.

If the Richmond plan is filed on May 1st I doubt that we could be ready in 18 days to—

Mr. Wickham: 11.

The Court: May 11. As a matter of fact it gets [9] worse. They don't anticipate having it before May 11, Mr. Chachkin.

Let me say this. We will have to set a time now, that is all. I want to make it as easy as I can on the defendants because I realize the fantastic job they have to do. On the other hand I realize it is a job they should have been at since the New Kent decision.

I want to give the plaintiffs an opportunity to be heard. I don't want to rush them with submitting their plan. What is done is done. What hasn't been done hasn't been done. Nothing is gained by rushing the defendants in the submission of their plan.

Mr. Chachkin: I am suggesting a later plan, certainly not an earlier one, if that is possible in convenience to the Court. We anticipate that we will probably have to have some fairly detailed alternatives, perhaps we won't. I share the Court's enthusiasm that if we don't have to object in any way—

The Court: How much time do you think, based on your experience with school systems of this size, how much time do you think you will need after the plan is submitted

before you can file your exceptions? Never mind the hearing, now.

Mr. Chachkin: Well, I would say three weeks to [10] a month. We are going to start working now.

The Court: Let me say this. That is not unreasonable, but I am really going to expect that the plaintiffs chip in and work overtime, so to speak, in order to speed up the process, because the only one that gets hurt if we don't do it right are the children.

All right. I am going to order in this order, I will put it in the same order as the injunction, I am going to order that the plan be filed by, well, May 11 is a Monday, Mr. Wickham. Is that all right?

Mr. Wickham: Yes, sir.

The Court: Plan by May 11. That exceptions thereto be filed by June 8. And in the event there are exceptions, hearing will be had on June 19, subject to my getting the docket clear on that day. And if it is not on the 19th, it will be heard on Saturday the 20th.

I would ask that the exceptions be reasonably detailed, Mr. Ely and Mr. Chachkin, for this reason. I think if you do, certainly those portions of the plan that you may not have any exceptions to, I think the defendants would be reasonable in going ahead and making their preparation on the theory it is going to be approved. This is still an adversary system, and while I recognize my responsibility, if you all agree on something it would shock me that I didn't go along.

[11] And if you are reasonably specific on your exceptions it helps me as to the issues and it helps the defendants too because they may wish to file an amended plan. Sometimes they can accept them.

Excerpts from Transcript of Proceedings of March 31, 1970

You may do that, incidentally, Mr. Wickham, after the exceptions are filed if you wish to file an amended one, quickly.

Any other matters we ought to take up or discuss, gentlemen? Any other issues? Any complicated issues that may be besides the word everybody doesn't want to talk about?

All right, let's see what the plan is.

Thank you very much. If the Court can be of any help I want to do it.

(The hearing in the above-entitled matter was concluded at five o'clock.)

I certify that the foregoing is a true and correct transcript.

/s/ GILBERT FRANK HALASZ
Gilbert Frank Halasz
Official Court Reporter

Transmittal Letter for Desegregation Plan from HEW to Superintendent L. D. Adams

(Dated May 4, 1970)

OFFICE OF EDUCATION

May 4, 1970

Dr. Lucien D. Adams, Superintendent
Richmond City Schools
312 North 9th Street
Richmond, Virginia 23219

Dear Dr. Adams:

The staff of the Division of Equal Educational Opportunities is pleased to submit to you a desegregation plan for the Richmond City Schools. The plan has been prepared in response to your expressed desire to achieve the goal of a unitary system of public schools and in accordance with our interpretation of action which will most soundly achieve this objective.

We wish to express our appreciation for the excellent cooperation received from you and your staff.

Sincerely yours,

/s/ E. H. Cooper
E. H. Cooper
Program Officer
Equal Educational Opportunities
Title IV

Excerpts from Transcript of Proceedings of June 19, 1970

[36] • • •

The Court: Dr. Little, do you recall any conversation or any suggestion that perhaps the freedom of choice plan would have to be changed by virtue of the United States Supreme Court decision prior to the [37] acquisition of these sites? Did you hear anybody say anything about it or do you think that the assumption was you ought to go on under the plan that you had because you felt it was a valid plan?

The Witness: Your Honor, we have discussed it. We had some serious problems with freedom of choice, freedom of choice plan. But in dealing with the Chesterfield County Schools, we did not feel that freedom of choice or attendance areas either would alter the basic place where youngsters would go to school.

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[39] • • •

Q. [Mr. Lucas] All right. This is a black area. When was this school planned? A. [Dr. Little] When was—

Q. Dove Street. When did you start planning this? A. We have been in one phase or the other of planning a school to take care of the overcrowded condition in this general area for about three years.

[40] We have had site acquisition problems, changing and resegregation of the entire neighborhood. This project

Excerpts from Transcript of Proceedings of June 19, 1970

was—has been in concrete planning for about a year.

Q. Dr. Little, in planning new construction, does the Board or did your staff, when you were in that part of it, affirmatively take into account the effect of locating a new school in terms of whether or not it would be segregated, would it actually integrate the school system, or did you just consider proximity and the concentration of pupils? A. I think I would have to say that we, that the School Board took into consideration both factors, but conditioning it on, in the elementary level, on reasonable walking distances of boys and girls from the concentration of population.

But what I am saying, I can recall the location of John Marshall High School, for example, on the extreme northern section of the city in anticipation of annexation that would tend in the long run to give us balances.

Location of John F. Kennedy on the extreme, as a matter of fact, into Chesterfield, into Henrico [41] County in anticipation of annexation to give us a balance, knowing that the concentration of blacks were in the core of the city and the whites were in the suburban area.

So, I think very definitely the School Board and the Administration has taken this into consideration, not just immediately but in many years past.

The Court: But, Dr. Little, I don't want to misinterpret your statement. I want to be sure that I am correct.

You say you felt the Board did consider the desegregation problem conditioning it on reasonable walking distances of students.

The Witness: Elementary students.

Excerpts from Transcript of Proceedings of June 19, 1970

The Court: Elementary students.

The Witness: Elementary students.

The Court: Are you saying that, so far as you know, that no consideration was given to clustering, clustering, pairing?

The Witness: In the construction of new schools?

The Court: In the planning for them in their location, and so forth?

[42] The Witness: No, I don't recall any instance where that has occurred.

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[50] • • •

Redirect Examination by Mr. Wickham:

Q. Dr. Little, in selection of the three sites for the elementary schools in the annexed territory, was any consideration of race given in selection of those sites? A. No, sir.

Q. How about the one on the North Side? A. No, sir.

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[78] • • •

Q. [Mr. Lucas] Mr. Sullins, have you testified for School Boards in support of their plans for desegregation in opposition to the Plaintiff's plan of desegregation? A. I have been called as an expert witness by School Boards too, I am certain, to support their plans.

Q. Did you testify in support of the Norfolk percentage Negro plan in the proceedings last October? A. I did.

Q. And you were called as a witness on behalf of the School Board in that case; is that correct? A. Yes.

Q. Did you prepare plans of desegregation in Mississippi? A. Yes.

Excerpts from Transcript of Proceedings of June 19, 1970

Q. What counties were they for? A. Hinds County, Madison County, and Canton Municipal Separate School District, I believe.

Q. And did you prepare to testify in those cases as to whether or not those plans could be implemented? [79] A. Would you repeat that, please, sir? Would you repeat the question, please?

Q. Did you prepare to testify in those cases with respect to whether or not the plan of desegregation which you prepared or which your team prepared could be implemented in those districts? A. Yes.

Q. Did you execute an affidavit as to whether or not certain plans of desegregation were educationally sound and whether or not they could be implemented in connection with the Hinds County case which later became the Alexander case? A. Yes.

Q. Did you execute an affidavit which indicated that that plan could be implemented and was educationally sound? A. Yes.

Q. And did you subsequently execute a second affidavit indicating that you thought the plan should not be implemented and should be restudied after motions were filed by the United States in that case? A. I believe I executed only one affidavit and it was the latter situation.

Q. You have already testified you executed one [80] that said the plans could be implemented before the policy decision was made in H.E.W., and did you execute a second affidavit that indicated—

The Court: Now, he did not testify to that, Mr. Lucas, in fairness.

Excerpts from Transcript of Proceedings of June 19, 1970

Now, he said that he had prepared an affidavit that the plan was sound. He did not say anything about before the policy.

Mr. Lucas: I believe he also said, Your Honor, it could be implemented; is that correct?

The Court: That is correct.

Q. It was sound and it could be implemented, is that right? A. I prepared one affidavit for the Hinds County situation in which I stated that the plan was educationally sound, but that it should be—that the implementation of it should be delayed.

Q. Did you previously make a recommendation that it could be implemented? A. Yes, over the two-year period that my plan called for.

Q. Then you subsequently made one that it should be delayed, is that correct, or you testified [81] that it should be delayed and restudied? A. In the particular Hinds County situation I did not recommend that Hinds County plan be delayed over the two-year period—I beg your pardon—to correct the statement.

The Court: All right, sir.

A. The affidavit which I submitted in Hinds County called for a request, I believe, for a delay of the implementation of the Hinds County plan until the following school year. The plan itself was a two-year projection. And I think my affidavit called for a delay until September of the following year, or at least a delay. I don't recall the exact month of delay.

Q. Had you not previously recommended that the plan be implemented during that school year, that it not be de-

layed? Had that not been part of your original recommendation in the case? A. The plan that was originally prepared, we were instructed to prepare plans for implementation in September.

Q. And you did so prepare plans to be implemented in September in a two-year stage; is that correct? [82] A. That is correct.

Q. And then you subsequently executed an affidavit, after some proceedings, and/or testified, perhaps both, I am not sure, that the plan should not be implemented in September; it should be delayed? A. That is correct, sir.

Q. And you were appearing as a witness for the United States at that time? A. That is correct, sir.

Q. And what position did you hold with the United States Office of Education at that time? A. The same position I now hold.

Q. You did not receive a promotion sometime during that period, Doctor? A. I did not, sir, except the usual in-grade promotion that comes at the end of one year if your services have been satisfactory.

Q. And what is your definition of a desegregated school, Dr. Sullins? A. A desegregated school in my opinion is one in which children are assigned to a specific school without regard to race, color or creed.

Q. A school that is 100 percent black is a [83] desegregated school, Dr. Sullins? A. In my opinion, if the faculty of that school is desegregated, there would be certain circumstances, I believe, where a school could be—the interpretation of desegregated or unitary could be placed upon that school system.

Q. Is it your interpretation, Doctor, as an expert, that a school with 100 percent black enrollment in a system

where there are whites in the system is a desegregated school? A. In my own opinion, yes.

Mr. Lucas: I submit the witness is not qualified, Your Honor, as an expert in desegregation.

The Court: According to what the witness has testified, according to the weight of the evidence, I am not satisfied that the qualifications are sufficient, I will be frank with you. But I am going to let him testify as an expert.

Go ahead and examine this witness.

Let me ask you one other question that just prompts it.

The innuendoes, Dr. Sullins, in fairness, [84] are that you recommended one thing and then later changed your mind.

Now, was that based on your own intellectual determinations, or was it based on a policy change by some Government office?

The Witness: It was based on a policy change, sir.

The Court: Now, did this plan—I presume that you had prepared this plan?

The Witness: Yes, sir.

The Court: Did you prepare it on a policy basis?

The Witness: As much as we have to operate under, yes, sir.

The Court: And what you are really doing, you are testifying to the policy of H.E.W.; is that correct, as distinguished from your capabilities as an expert on desegregation?

The Witness: Yes, sir. Yes, sir.

Excerpts from Transcript of Proceedings of June 19, 1970

The Court: All right. I take you as an expert on H.E.W. policy and for no other purpose.

[86] • • •

Q. [Mr. Wickham] Dr. Sullins, what was the purpose, or your purpose, or your team's purpose in assisting in the preparation of a desegregation plan for the City of [87] Richmond? A. To develop a desegregation plan which would provide for a unitary school system with as much integration, desegregation as possible.

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[89] • • •

Q. [Mr. Wickham] All right. In what ways did the school authorities help or cooperate with you and your team, Dr. Sullins? A. [Mr. Sullins] They furnished all the information we requested, information that goes on the building forms, special programs, the data that I have just mentioned.

Q. What guidelines are laid down by H.E.W. for you to follow in formulating a desegregation plan? A. There are no specific written guidelines [90] which we follow. The policies have changed, the unwritten policies have changed in the last year or two as far as the approach to desegregation plans are concerned.

There is more emphasis now upon the neighborhood school concept as the basis for a development of a plan.

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[118] • • •

Cross-Examination by Mr. Allen:

Q. Dr. Sullins, I would at least like to get straight on one thing I did not understand on cross-examination.

Excerpts from Transcript of Proceedings of June 19, 1970

What specifically is the policy of H.E.W. toward transportation? A. Utilize the transportation that is currently in the system to desegregate as far as possible, but not to burden a school system with additional cost of busses and transportation that wherein the funds might be better utilized to be spent on an educational program rather than transporting children from one end of the city or county to the other.

Q. So this would involve using the present public transportation facilities plus the school system's existing busses, but not require them to buy any more busses or not to make unreasonable requirements upon them to buy any more busses, which is it? A. As far as my limited experience is concerned, [119] and I can only speak for the new plans that I have taken to the ad hoc committee, there has been no requirement that the school system be forced to add additional busses to the school system to desegregate the system.

Q. Like none? A. Yes, none.

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[121] The Court: Or from anywhere else? From the School Board, did they tell you, "This is what we want to do"?

The Witness [Mr. Sullins]: No, sir.

The Court: What did they tell you to do?

The Witness: The School Board? Nothing. I did not meet with the School Board, sir, until the plan had been developed in almost final form.

The Court: Well, I meant school authorities. What did they tell you? What did they tell you the Board wanted?

The Witness: They did not tell me what the Board wanted. I did not inquire as to the in-put.

Excerpts from Transcript of Proceedings of June 19, 1970

The Court: What did they come in and ask you to do, that they wanted you to do at all?

The Witness: Except to try our best to meet the directive of the Court Order and they gave me the Court Order.

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[220] Q. [Mr. Wickham] The plan that has been presented here this morning and filed as Defendants Exhibit 1, has this plan been approved and adopted by the School Board of the city of Richmond? A. [Dr. Adams] It has.

Q. Will you relate briefly the circumstances leading up to this approval? A. We received a motion from the Court on March the 11th, and on the 19th the School Board instructed me to request H.E.W. to assist us in preparing a plan that would be in compliance with the law, and I did so by letter to Mr. Cooper in Charlottesville.

The team came in early in April and presented a plan to the School Board on April the 30th.

On May the 6th, the School Board meeting with the Clerk, attorneys, and myself, unanimously approved this plan as one to be submitted.

It was submitted on May the 11th to the Court.

Q. How many members do you have on your School Board in the city of Richmond? A. Five.

[221] Q. Are any of these members of the Negra race? A. Two of the five are.

Q. You are familiar with the fact that the Defendants reported to the Court and stated that the geographic zoning plan for the assignment of pupils, as presented by H.E.W., had been approved.

Excerpts from Transcript of Proceedings of June 19, 1970

What exceptions to the school plan, as presented by H.E.W., were made at that time? A. We asked in the plan two exceptions.

One was that those seniors who were in our school as of June of this year, 1970, those juniors who would graduate next year and be seniors next year and who were expected to graduate would be allowed to remain in their schools, since this is a most important function in their lives and they attach great importance to graduating from the schools they attended, and we asked that written request on the part of parents that seniors be allowed to remain in high schools during the 1970-71 school year as the first exception.

Q. What was the second exception? A. The second exception was that we asked that in the case of the integration or desegregation of the entire staff, the faculties of schools, that some [222] exception be made.

The School Board approved the idea entirely in principle; but felt that this much change during the first year would work an undue hardship, not only in terms of time, and the School Board asked that a variance of 20 percent from the recommended percentage or recommended ratio be given for the '70-'71 year only.

Q. What is your ratio, the faculty ratio as to the white and black teachers? A. When we add the annexed area teachers to our staff, the faculty will be about 50 percent white and 50 percent black.

Q. How much integration of the faculties do you have this current school year? A. We have a total of some—it is close to 250 counting the part-time people in the schools who are working in schools of the opposite race. This is an approximate number. I don't have the exact

number. That includes full-time teachers and part-time teachers and principals, and so on.

Q. Over the past two or three years, how many teachers have ben assigned to schools of the opposite race? [223] A. Approximately 500 since 1966.

Q. Why specifically are you asking the Court for the coming school year to give you a 20 percent leeway in the assignment of your teachers? A. Well, I think we have a number of problems in the assignment of teachers.

Number one is the time to make the necessary arrangements and study the situation. That is the primary consideration because we run into problems of certification of getting the right teacher in the right place certified for the right subject.

We also recognize that the faculties of these schools, many of them have been built up over a long number of years and are very important to the ongoing and continuity of programs in schools, and to make a major change in a short period of time, we feel, would seriously impair the continuity of programs that exist.

Q. Do you feel that you will actually obtain a fifty-fifty ratio by September of 1970? A. I think it would be highly problematical in being able to actually obtain that many, and that, of course, is one of the reasons we asked for some variance of these during the first year.

[224] The Court: While we are on that, Mr. Adams, tell me why.

The Witness: Why we asked for the 20—

The Court: No, no. I know why you asked for the reduction.

Excerpts from Transcript of Proceedings of June 19, 1970

Why would you be unable to obtain it? Don't your teachers under contract teach where you tell them to teach?

The Witness: The teachers are under contract; that is, many of our teachers are. Because of the, I think the uncertainty this year, we probably have a number of teachers that have not yet signed their contracts. I am not sure that those would come back if they were moved.

I know that you are aware of the fact that when a teacher has been in a school a long time they establish a great deal of attachment to that school and resist moving from it, and this has nothing to do with race whatever.

The Court: I am fully cognizant of that, Mr. Adams. This will be the first [225] Order that I have granted in which I have directed a specific proportion of teachers.

The Witness: We have many teachers who have bought homes close to their schools so that they could be there, and I am just not at all sure that many of those teachers would move to other schools if we asked them to.

We have used all the means that we know how during the past four years to get teachers to move from one school to the other short of making it a condition of employment.

* * * * *

[243] * * *

The Court: It is not H.E.W.'s responsibility. It is the School Board's responsibility.

Mr. Wickham: We understand that, Your Honor.

Excerpts from Transcript of Proceedings of June 19, 1970

The Court: Nobody else's.

Mr. Wickham: We have adopted this plan, Your Honor.

The Court: All right, sir.

* * * * *

[253] * * *

Q. [Mr. Lucas] You say this plan was adopted by the School Board? A. [Dr. Adams] Yes.

Q. Was that adopted at a public meeting or a secret meeting of the Board? A. It was adopted at the meeting with their attorneys.

Q. Is there anything in the minutes, in the official minutes of the Board of Education of the city of Richmond that indicates this plan was ever adopted by the system? A. Not in the minutes.

Mr. Wickham: Your Honor please, as Attorney for the School Board, I am authorized to state to this Court that the School Board and the school authorities have [254] adopted the plan that we here present.

The Court: Your representation is sufficient.

Q. Nothing that appears in the minutes; is that correct? A. Correct.

Q. How many alternative plans were considered by the Board of Education before deciding upon this plan as the plan it would adopt for presentation to the Court? A. No alternative plan.

Q. Were there any studies done by the Board or members of the staff indicating the possibilities of desegregation using transportation or any other technique? A. Not to my knowledge in terms of formulating a plan; that is, I am sure there were discussions of members of the staff of

possibilities, and so on, but no plan was adopted or—and so forth.

Q. Mr. Adams, you were in Court this morning when Dr. Sullins testified, were you not? A. Yes.

Q. And he testified about a rough plan that he drew up that would provide for racial balance and [255] he came up with an estimate of the number of students to be bussed and the number of busses to be used.

Was this developed in the material and information furnished by the Board of Education to the H.E.W. team? A. I don't know. I don't know anything about his development or what he developed it from. I have no knowledge of that whatever.

Q. Does the Board have its own Research Department? A. Yes.

Q. Does their Research Department have access to all of the statistical data in the system? A. Yes.

Q. What type of technological aids does the Department have to use in school planning? A. (No answer.)

Q. Does it have its own computers? A. The Research Department, no.

Q. Does the School Board have its own computer? A. Yes.

Q. And how long have you had a computer? A. I don't know. For a number of years.

[256] Q. Didn't you furnish answers to interrogatories with computer print-out of all the information on the faculty? A. Yes.

Q. And haven't you furnished information to the Richmond Redevelopment Housing Authority concerning pupil enrollment, pupil statistics and their locations within the system based upon computer print-outs? A. I don't know.

Excerpts from Transcript of Proceedings of June 19, 1970

Q. Would that be possible with the existing facilities that you have? A. I presume it would.

* * * * *

[262] * * *

Q. [Mr. Lukas] You say in your contracts at the present time you do not make the acceptance of assignment to a school at the election of the School Board as a condition of employment? A. [Dr. Adams] That we do not sign contracts for a particular school. That was not quite what I was referring to.

I said that in transferring teachers from one school to another one of the opposite race, we had not made that a condition of the contract. You understand—

> The Court: Let me get it straight. Your teacher contracts call for you to assign them wherever you decide to assign?
>
> The Witness: That is correct. What I [263] was referring to, the efforts that we have made to get teachers to transfer from schools of one race to one of predominantly the other race, and we have not forced them to do it under—
>
> The Court: You have not said, "If you don't go, don't sign our contract"?
>
> The Witness: If you don't, you don't have a contract. This is what I was referring to.

* * * * *

[267] * * *

Q. Has the Board put any sort of similar effort into desegregating the schools as to be compared to your effort to reduce the teacher-pupil ratio- A. The schools

since '66 have been operating under a freedom of choice plan in which we had to be quite careful in not insisting one way or the other in terms of children, and we were frequently accused anyway of trying to keep people in a school or not. We had to really be very objective in what we did.

Q. Do you feel that you as an Administrator and the Board have an affirmative duty to eliminate [268] the racial identity of schools in the system? A. Yes.

* * * * *

[304] * * *

The Court: In that connection, was any studies or how many studies were made as to how many of the students who have exercised their right of freedom of choice actually use either public transportation or private transportation, stationwagons, car pools?

The Witness [Dr. Adams]: We have not made that determination, we have not made a study of it. I don't know the answer to that.

Excerpts from Transcript of Proceedings of June 20, 1970

[320] [The Court] That is the point that I think is so very, very material. I am not at all sure that the defendants, and I would not want to put it on them if that is not their admitted position. I don't know. But it seems to me that that has to be. If free choice didn't work, it didn't work, and if the defendants admit they have to do something else, and they admit it didn't work because they were operating segregated schools which is constitutionally impermissible.

It is also apparent that the Plan that was tendered was done so in an effort to correct the results of their conceded segregation, and it is obvious under the law of this circuit that where a School Board operates a system which is violative of constitutional requirements, the burden is on the School Board to explore every reasonable method of desegregation, including rezoning, pairing, grouping, clustering, school consolidation, transportation, including majority-minority transfer plan.

[321] I am not sure that the plan that is tendered does not contemplate a free transfer plan for primarily those of the Negro race only. I believe that is it. I am not sure that's constitutionally permissible.

In short, the Board is under a duty to utilize all reasonable means to dismantle the school system to eliminate racial characteristics.

The evidence before the Court is that all facets were not considered. If the defendants concede that the failure of free choice, if they agree that the Court's statements are accurate, were created by something more than just residential patterns, and it seems to me that it would have to be or they would not admit that the free choice did not work.

Excerpts from Transcript of Proceedings of June 25, 1970

[1122] • • •

Q. [Mr. Lucas] Dr. Little, assuming transportation of pupils, is there any way to achieve what you consider to be, as an educator, an optimum of desegregation in the Richmond area? A. [Dr. Little] In the Richmond area, yes.

Q. How would you do that? A. It would involve the involvement of a larger area than the present city boundaries of the city of Richmond.

Q. Are you talking about Henrico County, Chesterfield County or both? A. Henrico County, Chesterfield County, and the [1123] possibility of the general metropolitan area, maybe bordering on, in other counties other than Henrico and Chesterfield. Basically, the problem could be solved within the city of Richmond, Henrico and Chesterfield Counties.

• • • • •

[1126] • • •

Q. [Mr. Lucas] Dr. Little, I notice that the Research Department has prepared a lot of data, a lot of maps and exhibits, and so forth.

Do you all have computer processing? A. [Dr. Little] Yes, sir.

The Court: We have been through this, Mr. Lucas, I recall.

Mr. Lucas: Your Honor, I have only one question that I really want to find out, if they have devoted comparable study to the possibilities of devising or feasibility of a plan involving transportation.

Q. Has that ever been done? A. Mr. Lucas, I have given a great deal of consideration personally to the involvement

of transportation and the logistics, the complications, the numbers and the cost, yes, sir.

Q. Now, I don't mean a formal plan, but have you ever performed written—is it in writing anywhere in the last couple of years, a study of the comparable skills and techniques, or the numbers, [1127] how many busses that will be needed in order to desegregate within Richmond itself? A. Yes. Sometime ago I asked my staff to give me an estimate on the number of children that would have to be moved from our high schools, from our schools as reflected by the enrollments of last September, how many would have to be moved out and how many would have to be moved in to gain a balance directly in proportion with the racial composition of that level of instruction, elementary, junior and senior high school.

Q. You said you used the enrollments of this past September? A. The enrollments and school organization of last September.

Q. Did you figure out how many busses you would need? A. I made an estimate of the number of busses, yes, sir.

Excerpts from Transcript of Proceedings of June 26, 1970

[1190] The Court: Well, gentlemen, I think it has been perfectly obvious from the very beginning, as the case unfolded, that the School Board has not borne the burden placed upon it by the law. I hope we will not lose sight of the fact that the burden is the School Board's burden, not the Plaintiffs' burden.

The Court had real fear, so to speak, from the very first witness, that the School Board's Plan could not be approved.

In the first place, it was formulated without regard to what the law of this Circuit requires. The witness testified, Dr. Sullins, that it was their policy to just disregard any transportation at all. He also said that it was, as I understood at one point, it was his policy, at least, to attempt to desegregate schools without considering race. How do you ever do that, I don't know. To desegregate, you have got to give consideration to race. Utterly ridiculous.

Now, it is the School Board's burden in devising its plan and it is the Court's [1191] responsibility in considering whether the plan is adequate, to explore every reasonable method of desegregation, including rezoning, pairing, grouping, school consolidation, transportation, majority-minority transfer plans, satellite zoning. In short, in this Circuit, it is necessary to consider any and all reasonable means to dismantle the dual system and eliminate the racial characteristics of the schools.

The citations are so obvious, Swan v. Charlotte-Mecklenburg; Green v. School Board of the City of Roanoke; the Franklin case; the Southampton case; Brewer v. Norfolk.

Excerpts from Transcript of Proceedings of June 26, 1970

The Swan case, I think, is the, certainly the leading case in this Circuit, the first one to come down in which it faced this busing business to some extent.

This Court is bound in determining the use of transportation or zoning or clustering, or anything else, to use the rule of reason, which may not appear to be very definitive, and it is based, I think, upon the premise that everybody is going to act in good faith. [1192] Now, the only statement that I can find with reference to the Swan case considering the neighborhood school concept is the statements of Judges Sobeloff and Winter in their concurring opinion in the Brewer vs. Norfolk case wherein they say, that the Court should not tolerate any scheme or principle, however characterized, that is erected upon or having the effect of preserving the dual system. This applies to the neighborhood school concept, a shibboleth decisively rejected by this Court in Swan as an impediment to the performance of the duty to desegregate.

Now, that is not a dissenting opinion. That is part of the majority opinion, talking about the Swan case.

The School Board's plan as contemplated fails for another reason. It fails to do what is required to do in reference to the faculty.

Now, with respect to the faculty, teachers in this Circuit must be assigned so that the ratio of black teachers to white [1193] teachers in each school will be approximately the same as the ratio of black teachers to white teachers in the entire school system, which I think Mr. Adams destroys. As a

practical matter, your hope of the twenty percent variance.

I will say this, it is this Court's opinion that, as binding as that statement appears, I think I can take it in context with the rule of reason that is contemplated in the Swan case, that there may be very, very special exceptional circumstances which the Court will consider when the plan comes in, but it cannot be any blanket ten percent or four percent or three percent, special, special circumstances.

Gentlemen, the Court is going to require in its ultimate requirements, that the dual system here has been perpetuated by virtue of the fact that segregation has been sponsored by the local, state and federal authorities, not—Negroes live where they live because they have no other choice. The laws have been such. I don't think it is a choice now, [1194] and I would ask you to keep that in mind in preparing your new plan because it may have an effect as to how far the School Board has to go.

The proposed plan by HEW, and adopted by the School Board, according to my calculations, subject to being corrected, because my mathematics are not the greatest, it would appear that East End, for example, out of sixteen schools, they were going to leave thirteen schools with 93 percent or more Negro. One school would have had 88 percent Negro; four schools would have 100 percent Negro, and it appears that only two, Fulton and Webster-Davis, appears to have been reasonably desegregated, and in that case they would have had 36 percent roughly of white as to 63, almost 64 percent Negro.

Excerpts from Transcript of Proceedings of June 26, 1970

In the annexed area, their plan contemplated out of ten schools that there would be ten with 89 percent or better with the white race, and two with 100 percent white race. The most, highest percentage of [1195] Negroes in the annexed area, as contemplated by the plan submitted, Negro, 5.1 percent against 94.9 percent white. I think the best way to describe that, gentlemen, in the situation—let's finish—in the West End on the north side there were, let's see, one school would have had 2.8 percent white as against 97.2 percent Negro. There are 1, 2, 3, three schools would have had 100 percent Negro.

Another school, Norrell and Norrell Annex, would have had 4.4 percent white; Graves Jr., would have had 7.5 percent white; Maggie Walker, 9.1 percent white.

The South Side appears to have been one of the other schools more reasonable in getting closer to working it out, but even then the whites predominate.

Now, I am not giving a definite ruling because I think the School Board ought to have its opportunity to attempt to come up with a plan. I don't know of any instances, gentlemen—I wish everybody would keep this in mind—where the Court has drafted a plan. [1196] Now it may be. I am certainly reluctant to do it. I don't want to. I don't think you all ought to put it on me.

What has happened, as a practical matter, is that Courts in other areas, to my knowledge, where they cannot find a plan approved by the School Board, they have arbitrarily taken the Plaintiffs' plan.

Excerpts from Transcript of Proceedings of June 26, 1970

In reference to the Plaintiffs' plan, the Plaintiffs' witness very frankly admitted that there could be improvements made upon it. I don't care how you add the figures, there are going to be at least 9,000 children who are going to go by transportation next year if we were not even in litigation, annexed or voluntary, or what. I suspect there is not as much walking as the record might indicate, and I am not saying that 18,000 people being bussed is a reasonable number, but it is not as extreme as it would sound at first blush when you take into consideration how many are already being transported.

The School Board must realize, and I am [1197] sure counsel all realize it—oh, I have one other point—I don't think without making a definitive ruling that .2 or .3 of one percent white children in a school with 99.7 Negro children, or .3 of one percent of the Negro children in a school with 99.7 percent is an integrated school. That is sprinkling. I would think that if that had to come to pass, we would be better off to have it 100 percent one race.

I have already expressed myself on what the HEW plan did to Mr. Allen's clients. Gerrymandering, just to take 45 white children, that is not integrating schools. That is sprinkling.

I hope that the School Board now has a better idea of where they can go. I think they have got some benefit from all of this testimony here, but we must bear in mind it is their responsibility, they are the ones under the law. HEW, I am afraid we cannot get any help from them, gentlemen, if their policies are such that it conflicts with the [1198] constitutional

requirements, and Dr. Sullins said that it did. I am sure that the Courts, or, at least my view of the Courts are that we ought to attempt to cooperate and follow the Executive Branch as best we can, but when it conflicts with constitutional requirements, trial judges have no choice but to follow their appellate courts and I intend to do it, as unpopular as it may be. The public may not understand it but I think the Bar understands and I do. I am going to do it. I think we can work it out. I have every hope. I am perfectly willing to look at alternative plans. It may be traumatic but we might just as well face it. It's got to be done. We have had several years, and I will not dwell on it, but it has been several years since the New Kent case and nothing has been done. Nothing seems to be done until somebody comes in and creates litigation. So the problems and the hard work are really things of our own making.

All right, gentlemen, I am going to [1199] reject the plan as submitted, and I am going to take the Plaintiffs' plan under advisement and I am not going to put that into effect at this stage, and hopefully I won't have to put it in effect at all. But I will ask the School Board to submit the plan to this Court on or before July 27, 1970. And you might look at the order entered by Judge Hoffman, Mr. Wickham and Mr. Wimbish, in the Norfolk case in which he suggests that the plan may be based on suggestions made by the government's expert witness, in that case, Dr. Stoele.

Had I been able to find an expert that I thought had not been on one side or the other, I don't mind

Excerpts from Transcript of Proceedings of June 26, 1970

would have gotten, and I still telling you the Court it is kind of hard to find an may, if I have to, bustified for either the School expert who hasn't t ACP plaintiffs. That doesn't Board or for the N ot perfectly honest, but it is mean that they are ed if we can, I think. something to be avoi it you have to do [1200] and

Now, you know wh exceptions to the plan by the I will ask you that an ors be filed by August 3rd. Plaintiffs or Interve exceptions will be conducted Hearings on any suc h. on Friday, August 7 lay that I wanted findings of

Now, I said yester dings of fact. To some extent fact, the proposed fi ficult without a plan it looks it may be a little di pprove or without the School like the Court can a an, but I still think it can be Board's additional p is concluded, though it may done before the pla do it in the eight days that I not be necessary to have suggeested. M ybe that time can better be spent by Mr. Wickha m and Mr. Wimbish in assisting the School Boarc in conforming to the requirements of the law. S I will ask you to have them within—what do you think is reasonable, Mr. Wickham?

Mr. Wickham: Yc ur Honor please, I suggest a week prior to submis sion of the School Board's next plan.

The Court: All right, that will be fine.

[1201] Mr. Wickham: July 20th or what date?

The Court: Well, do it on Monday. That's right, the 20th. Would you do that, gentlemen, for me?

Excerpts from Transcript of Proceedings of June 26, 1970

I want to thank—I won't say it to you again, Mr. Lucas. The last time I told you how appreciative the Court was, you lost your case completely. I won't put that on you this time. I am appreciative of the help that all counsel have given, including the intervenors.

I know it is a lot of work for the School Board, but I think you can do it. You have to do it. We have no choice. That's all there is to it.

All right, gentlemen.

Mr. Gray: Judge, before you stop, would you indulge me a moment before you adjourn court?

The Court: Sure. You are the real expert on desegregation.

Mr. Gray: Thank you, Your Honor.

The Court: All right.

Now, one other matter, gentlemen. I have [1202] concluded, after hearing the testimony of Mr. Kiepper yesterday, that it is imperative that the members of the City Council be joined as party defendants to this action here.

Federal Rule 21 provides that parties may be dropped or added by order of the Court on motion of any party that should be initiated at any stage of the action on such terms as are just.

Whatever members of the School Board have to do they are going to have to have the cooperation of the City Council, and that's all there is to it. And if nothing else the case will attract their attention, I think, more vividly if they are party defendants.

So in accordance with Rule 21, I am going to make them party defendants. See Halladay v. Verschoor, 381 F.2d 100, is my authority for it.

Excerpts from Transcript of Proceedings of June 26, 1970

All right, gentlemen, thank you very much.

The Court will take a brief recess [1203] before going on with my other docket.

Mr. Lucas: Your Honor, there is one other matter —in view of some of the testimony about the time span for acquiring transportation facilities and the availability of possibly some busses from Chesterfield County, we have not gone through, we would like to suggest to the Court some sort of order like Carter or like Medford requiring the Board to be prepared to perform in terms of providing transportation, whether that requires taking bids—

The Court: Well, thank you, Mr. Lucas, for your suggestion, but I don't think I am going to adopt it. I have already suggested that counsel for the School Board examine the order entered in the Brewer case, and in that order, I might add, the School Board was directed to contract with VTC for the transportation of students.

I will say this: I do not think the schools in the City of Richmond can open until a plan that is acceptable by the Court has been adopted, and the plan must be in effect [1204] when schools open for the fall term.

Mr. Lucas: Thank you, Your Honor.

The Court: Recess the court.

(Recess)

(Adjournment)

Motion for Attorney's Fees, etc.

(Filed July 2, 1970)

In the United States District Court

For the Eastern District of Virginia

Richmond Division

Civil Action No. 3353

Carolyn Bradley and Michael Bradley, infants, etc., *et al.*,

vs.

The School Board of the City of Richmond, Virginia, *et al.*

Motion

Plaintiffs, by their undersigned counsel, respectfully pray that this Court enter an Order directing the defendants to take all necessary steps to implement a plan of desegregation which provides for the elimination of the racial identity of each school in the Richmond public school system, effective with the commencement of the 1970-71 school year, including but not limited to, the provision of adequate transportation facilities, by contract or purchase, securing the necessary capability and capacity for the transportation of all pupils eligible, in accordance with such non-racial transportation standards as the Board shall adopt, for such transportation to the schools to which they may be assigned under such a plan, and the use of route plan-

ning assistance from the state Department of Education;

Plaintiffs further pray that this Court enter an Order directing the defendants to take no steps which are inconsistent with or which will tend to prejudice or delay a schedule to implement, effective for the 1970-71 school year, the desegregation plan proposed by the plaintiffs, which this Court has taken under advisement;

Plaintiffs further respectfully pray that this Court direct that all steps necessary to provide adequate funds for the constitutional operation of the Richmond public schools effective for the 1970-71 school year be taken, including but not limited to the transfer of funds from present capital budget categories for planned construction or other capital improvements, to operating budget categories, the securing of additional appropriations to operating budget categories, the application for assistance from the Virginia State Department of Education, application for all available federal funds, including but not limited to transfer of Title I allotments from other programs to meet transportation requirements, as well as for such assistance as may be available or as may become available under the Civil Rights Act of 1964;

Plaintiffs further pray that in light of the burden upon plaintiffs and the cost and disbursements required in this action, the Court make an interim award of all out-of-pocket costs incurred by the plaintiffs since the filing of the Motion for Further Relief, said costs to be certified to the Court, as well as attorneys' fees in an amount to be determined by the payment made or to be made by the school board to special counsel retained by it in this cause.

In support of this Motion, plaintiffs respectfully refer the Court to the decision of the United States Supreme Court in *Carter* v. *West Feliciana Parish School Bd.*, 396

U.S. 226 (1969); *CF. Alexander* v. *Holmes County Bd. of Education*, 396 U.S. 19 (1969); *Nesbit* v. *Statesville City Bd. of Education*, No. 13229 (4th Cir., Dec. 2, 1969); *Stanley* v. *Darlington County School Dist.*, No. 13,904 (4th Cir., Jan. 16, 1970); *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, —— U.S. —— (June 29, 1970), and to the Memorandum of Points and Authorities previously filed herein.

Respectfully submitted,

/s/ Norman J. Chachkin
M. Ralph Page
420 North First Street
Richmond, Virginia 23219

James R. Olphin
214 East Clay Street
Richmond, Virginia 23219

Jack Greenberg
James M. Nabrit, III
Norman J. Chachkin
10 Columbus Circle
New York, New York 10019

Louis R. Lucas
525 Commerce Title Building
Memphis, Tennessee 38103

Attorneys for Plaintiffs

District Court's Letter to Counsel

(Dated July 6, 1970)

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Richmond, Virginia 23219
July 6, 1970

Chambers of
ROBERT R. MERHIGE, Jr.
District Judge

M. Ralph Page, Esquire
420 North 1st Street
Richmond, Virginia 23219
James R. Olphin, Esquire
214 East Clay Street
Richmond, Virginia 23219

Re: Carolyn Bradley and Michael Bradley, etc., et al. v. The School Board of the City of Richmond, Virginia, et al. Civil Action No. 3353

Gentlemen:

Your motion filed July 2, 1970, in re the above styled matter, has been brought to the attention of the Court, and unless I am requested to do otherwise by counsel for the defendants, no action will be taken on this motion until the defendants have been given an opportunity to be heard thereon.

It may be appropriate, however, for the Court to suggest to all counsel that heretofore in cases of this nature it has been the Court's practice to request counsel to attempt to come to a understanding in reference to fees prior to the

Court taking any action thereon. In any event, it would appear that if the parties cannot agree in reference to that issue, a ruling on same ought not to be had until after a plan has been approved.

It also occurs to the Court to suggest that it ought to be unnecessary for the Court to enter any order as suggested by Paragraph 2 of your motion, for I am satisfied that counsel have advised their clients of the law as enunciated by the Court of Appeals of this Circuit as well as by the United States Supreme Court in the *Alexander* case, to the effect that there can be no further delay in the establishment of a unitary school system. It would appear inappropriate, in any event, for the Court to direct the manner in which the defendants are to comply with the constitutional requirements.

I am sure that all counsel are aware of the fact that this Court has not to date prepared any plan of desegregation, and does not intend to do so in this instance. That burden rests upon the school board. Obviously if the school board cannot file a plan which is constitutionally viable, and another plan has been filed by either the plaintiffs or intervenors which is constitutionally viable, the Court has little choice but to approve that which is required under the law. Paragraph 3 of your pending motion suggests that the Court enter certain orders directing the defendants, in essence, in the manner in which they are to approach the immediate problem. I do not think this is necessary, although it is certainly appropriate for the Court to make suggestions.

It appears to me that the Court's findings from the bench were sufficient to suggest to all counsel, and to the defendants in particular, that they explore all reasonable means to the end that their proposed plan conforms to the requirements of law. I know of no stronger language than that stated by

the United States Supreme Court in the *New Kent* case, wherein the Court stated that the burden is upon the school board to take "whatever steps are necessary."

I am sure all parties recognize that the burden upon the school board in the submission of any plan is such that any plan which cannot be shown to be one which furthers conversion to a unitary, non-racial, non-discriminatory system must be held inacceptable.

The Court, of its own knowledge, recognizes that we are rapidly approaching a state-wide system of school districts which conform to the requirements of law.

I am hopeful and confident that the defendants are exploring every reasonable method to reach the ultimate goal. I am sure all recognize that the manner in which desegregation is to be achieved is subordinate to the effectiveness of any particular method or methods of achieving it. It is obvious that the United States Supreme Court tests the plans by their effectiveness.

This Court is not so insulated as not to be cognizant of some of the problems the school board is facing, including perhaps community opposition. As the Court stated from the bench, as traumatic as it may be, it must be done. No opposition can serve to prevent vindication of constitutional rights.

I am sure that all counsel are appreciative of the fact that the Court stands ready to assist in any manner consistent with its obligations, to the end that a plan constitutionally acceptable is formulated.

I feel confident that the defendants will utilize any assistance they may deem appropriate, including help from the Health, Education and Welfare and the State Board of Education.

It may be that it would be appropriate for the defendant

school board to discuss with the appropriate officers of the contiguous counties as to the feasibility or possibility of consolidation of school districts, all of which may tend to assist them in their obligation. They may well determine to look at the prospects of a "feeder" system, consolidation, pairing, zoning, etc.

In spite of the guidelines afforded by our Circuit Court of Appeals and the United States Supreme Court, there are still many practical problems left open, as heretofore stated, including to what extent school districts and zones may or must be altered as a constitutional matter. A study of the cases shows almost limitless facets of study engaged in by the various school authorities throughout the country in attempting to achieve the necessary results. I have the utmost confidence and hope that the instant defendants will study all reasonable methods prior to their submission of a plan.

This letter is not to be construed as a formal ruling in any manner whatsoever on your pending motion. I realize there are cases in which the Courts have granted the interim relief requested by you in your motion; cases by which this Court may well be bound. You may be assured that every consideration will be given to your motion at such time as the Court deems it appropriate.

I felt, however, that this might be an appropriate time for the Court, consistent with its obligations, to weigh the ultimate suggestions in light of any alternatives which may appear as feasible and more promising in effectiveness, to remind all parties that the Court did not intend its statements from the bench to be limiting in any manner whatsoever as to the methods to be studied by the defendant school board.

It may be appropriate at this time to advise all counsel that there has been at least one informal motion for leave to

file a brief *amicus curiae,* and since the Court cannot at this time conceive of any reason why any additional intervenors would be permitted, I likewise can see no reason why the Court should not be most liberal in granting permission to file briefs *amicus curiae* and an order so stating will be this day entered.

Thanking you, I am

Very truly yours,

(s) Robert R. Merhige, Jr.,
Robert R. Merhige, Jr.
United States District Judge

cc: All counsel of record

Submission of Interim Plan by Richmond School Board

(Filed July 23, 1970)

Pursuant to the Court's order of June 26, 1970, the School Board of the City of Richmond, Virginia, has adopted and herewith submits its plan for the operation of unitary schools for the school year 1970-71. Such plan has been prepared so as to conform to the requirements of law as heretofore enunciated by the United States Court of Appeals for the Fourth Circuit.

WHEREFORE, the defendants move the Court to approve the attached plan.

THE SCHOOL BOARD OF THE CITY OF RICHMOND

* * *

PLAN FOR THE OPERATION OF UNITARY SCHOOLS FOR THE SCHOOL YEAR 1970-71 BY THE SCHOOL BOARD OF THE CITY OF RICHMOND

SUMMARY OF PLAN

1. All high schools are desegregated.

2. All middle schools are desegregated.

3. Wherever possible, all elementary schools are desegregated. Since black residential areas are so large that not all elementary schools can be integrated, the School Board will make available to pupils in the black schools special classes, functions and programs on an integrated basis.

4. The majority of the school careers of all students will be at integrated schools.

5. The School Board will allow majority to minority transfers and will provide free thansportation by common carrier for those pupils requesting such transfers.

6. The racial ratio of the faculties in each school will be approximately the same as the ratio throughout the system. The Board will make exceptions only for specialized faculty positions.

7. Upon written request, the School Board will permit those students who will enter the twelfth grade in Sep-

tember, 1970, and who reasonably expect to graduate in June, 1971, to remain in the schools which such students attended in June, 1970.

Basic Details of Plan

The basic organization pattern proposed by the School Board of the City of Richmond provides for the pre-annexation area of the city as follows:

Primary-elementary schools to house K through grade 5
Middle schools to house grades 6 through 8
Senior high schools to house grades 9 through 12

and in the newly annexed areas of the city

Primary-elementary schools to house grades K through 6
Middle schools to house grades 7 through 9
Senior high schools to house grades 10 through 12

The basic organization structure of the senior high schools includes grades 9 through 12. Where consideration of space necessitated, exceptions are made: namely, in the newly annexed area Huguenot High School will house grades 10 through 12 and Elkhardt and Thompson Middle Schools will house grade 9. The boundaries of the senior high schools are drawn so as to be contiguous, with one exception, this being Kennedy High School. Here satellite zones are used. Every high school building is filled to or above capacity. Portable classrooms will be used in some instances.

The senior high school plan will be implemented through the use of Virginia Transit Company regular busline transportation accompanied by a staggered opening and closing of school. On the advice of the Virginia Transit Company,

the Company will be able t

load but it will be necessa o accommodate the transportation schedule at approximately ry to open schools on a staggered to close school at two, y eight, nine and ten o'clock and respective pupils involved. three and four o'clock for the

The middle school plan

marily to accommodate s of organization is designed pri- eight. Exceptions to this tudents in grades six, seven and middle schools in the nev basic plan were required for the restrictions and the arran wly annexed area due to housing for the exchange of stu gements with Chesterfield County Elkhardt Middle Schools idents. Here the Thompson and nine until the School Boa will house grades seven, eight and assume control and resp ard of the City of Richmond can annexed area that must be ponsibility for its pupils in the in accordance with the ann e educated by Chesterfield County attendance areas are simi nexation decree. The middle school tendance areas with varia ilar to the senior high school at- ing space dictates. In the ations only where available build- school buildings have bee majority of instances, clusters of tion of middle school atte n used to house the pupil popula- attendance areas were de endance areas. The middle school senior high school attenda signed to be co-terminal with the facilitate transporation. ance areas where possible so as to regular busline Virginia As with the senior high schools, will be utilized. Likewise Transit Company transportation hours are necessitated. Th staggered opening and closing advised the School Board he Virginia Transit Company has date this additional volu that the Company can accommo- conditions set forth above

The attendance areas me of transportation under the have been drawn to accom

through rezoning, pairin for primary-elementary schools plish a maximum of desegregation g, grouping, school consolidation

and transportation, with the Virginia Transit Company maintaining its special elementary school buslines to accommodate elementary pupils who live beyond a reasonable walking distance from school. The assignment of small minority groups to certain schools is due to existing housing patterns of a limited racial mix.

Where primary-elementary or middle schools could not be integrated because of large black residential areas, the School Board is establishing social studies learning centers. These learning centers will be used to supplement such existing learning centers as the Virginia Museum of Fine Arts, the Valentine Museum, Maymont Wildlife Center, the Richmond Area Math-Science Center, Richmond Technical Center and the Richmond Trades Training Center so as to provide more desegregated learning experiences. For example, where the minority race is 10% or less in a particular school, individual classrooms of pupils in such schools will be paired with individual classrooms of pupils of the opposite race for the school year in order to provide an integrated educational experience in one of the learning centers or by inter-school visitation. The upper elementary and middle school pupils will be scheduled on at least a weekly basis and the pupils in grades K through three will be scheduled at least once every two weeks. Transportation will be provided through School Board owned equipment during the middle of the day. In addition, excursions and field trips for the same pupils will be provided.

Excerpts from Transcript of Proceedings of August 7, 1970

[18] The Court: Well, the main difference is the School Board, who has known since May 27, 1968, that freedom of choice was not constitutionally viable unless it works, wait for two years to come into court. After they are brought into court they stand up and admit it did not work.

Mr. Mattox: The School Board was operating a system under the direction of this Court.

The Court: But they knew that that was no longer valid.

Mr. Mattox: But it was still operating, Your Honor, as—

The Court: You mean they were using the technical aspect; is that it?

Mr. Mattox: No, sir, they were following the directive of this Court.

The Court: In spite of the fact that they knew that that was no longer the law, Mr. Mattox, really?

Mr. Mattox: Your Honor, the law—any School Board apply this as the law under the order that was issued in this case. Whether [19] the law had changed or not is beside the point. It was not the law in this case at that time.

The Court: What you are saying is that this Court had better not leave any loose ends because the School Board will grab it; is that it?

Mr. Mattox: No, sir.

The Court: What are you saying?

Mr. Mattox: I am saying this School Board will follow the order of this Court to the nth degree and I am sure that it will.

Excerpts from Transcript of Proceedings of August 7, 1970

The Court: All right, sir. Thank you.

• • • • •

[33] The Court: I cannot, I can tell you right now in good conscience, order the operation of a school system which the Defendants have openly—and I am not critical of it because I think you can look at the figures and see they were right—and I am going to make a finding of that in my ultimate findings. Just the figures themselves tell what the School Board did. It was a nice, honest thing to come in and say, "Let's not waste any more time on it. It simply has not worked, and let's get to it."

• • • • •

[77] • • •

Q. [Mr. Little] Coming to the basic plan, Mr. Adams, we are presenting today, what was the basic guideline, or let me go back just a moment, who prepared this plan, sir? A. [Mr. Adams] This plan was prepared by members of my staff, under my direction.

Q. What was the basic guidelines used in preparing this plan, sir? A. We went to the statement from the Bench, that we should consider the Charlotte-Mecklenburg and the Norfolk case, and the Norfolk case, which the decision was made on [78] June 22nd, seemed to express the opinion that gave us more direction in terms of preparing the Plan that we have submitted, and we extracted an excerpt from that decision and we have used that, and I would like to read it, if I may, as the basis for the Plan we have submitted.

Q. What you are reading are Exhibits from the Brewer case; is that correct? A. Right.

Excerpts from Transcript of Proceedings of August 7, 1970

"The Plan should immediately desegregate all high schools. With respect to elementary and junior high schools, the Board should explore reasonable methods of desegregation, including rezoning, pairing, grouping, school consolidation and transportation. If it appears that black residential areas are so large that not all schools can be integrated, the School Board must take further steps to make sure that no pupil is excluded because of his race from a desegregated school.

"The Board should make available to pupils in the black schools special classes, functions and programs on a integrated basis and it should assign these pupils to integrated schools for a substantial portion of their school careers.

"The School Board must amend its transfer position to freely allow majority to minority transfers and provide [79] transportation by bus or common carrier so individual pupils can leave black schools. The plan must include provisions for the integration of facilities so that in each school the racial ratio shall be approximately the same as the ratio throughout the system."

• • • • •

[102] • • •

Q. [Mr. Little] All right, Mr. Adams, if you will, proceed to explain the basic plan for the elementary schools? A. [Mr. Adams] We have taken advantage of all of the suggestions of the Court in that we have rezoned, we have paired, we have clustered, and we have consolidated and made use of available transportation to desegregate the elementary schools as far as possible.

Q. May I come back to the—excuse me.

The Court: May I just ask one question?

Mr. Little: Yes.

Excerpts from Transcript of Proceedings of August 7, 1970

The Court: You did not give any [103] consideration to additional transportation—

The Witness: Yes, sir.

The Court: —is that correct?

The Witness: No—we did.

Mr. Little: The witness said he did.

The Court: He did?

Mr. Little: Yes, sir, to the extent reasonable, I think he said.

The Witness: We considered transportation to the extent of reasonableness—

The Court: No, I mean additional from what we have already got, City Transit, school busses, and so forth?

The Witness: We went to Virginia Transit and asked them if they could provide any more transportation to move elementary children and they did not.

We did not have enough of our own transportation in order to do all of that, so that we have—

The Court: Let me interrupt something. I am not critical of it at this stage. I am trying to find out whether or not you came up with any other plan, or suggested [104] plan, contingent upon your having the transportation you wish you had perhaps?

The Witness: We certainly looked at, we certainly looked at the idea of eliminating the large number of black schools that we had in this area that are primarily here. And we felt that even if we had transportation, we had many factors that entered into the discouragement of use of transportation.

We did look at and we did consider the pairing of the elementary schools that we left totally black with those that are almost all white.

The Court: But that would take transportation?

The Witness: That would take transportation.

The Court: Did you come to the conclusion, Mr. Adams, that the only way, whether you like it or don't like it is really immaterial at this stage, that you can really get rid of all these—now, I counted 19, roughly 19—to get rid of [105] these all-black schools would be transportation?

The Witness: That is the only way.

The Court: All right, sir, that is what I wanted to know.

The Witness: That is, we have 12 schools that are more than 90 percent black and we have 7 schools that are more than 90 percent white, and the only way that we can eliminate those schools from this situation is by transportation and cross-bussing and pairing of those schools.

* * * * *

[111] * * *

Q. [Mr. Little] All right, sir. Now, did the Fourth Circuit in what you read, did they not direct that you consider time and distance, age of children? [112] A. [Mr. Adams] That is correct.

Q. And you did that? A. We did consider that,

Q. What else did you consider? A. We, of course, have the problem of obtaining the transportation necessary to do this job. We were informed at the close—we made some investigation during the trial that indicated it would take us up to three months to get the transportation if we had the money and ordered at that time. We did not see any

reasonable way of getting additional transportation since VTC could not furnish it.

Q. Stop right there.

You did confer and go over this with VTC to see if available public transportation was available? A. That's right.

Q. And what were you advised? A. We were advised that they could not handle it. In fact, they were handling all they could with the load that we had suggested for the secondary schools.

* * * * *

[202] * * *

The Court: Excuse me. Mr. Adams, while you are on this, in consideration of pairing, was your failure to pair schools, and it is obvious if you paired certain schools you could get rid of all these 12 all-black and 7 all-white, but was your failure to do it based solely upon the transportation problem or did you or—not you—but did the Board give consideration to patron opposition of taking their children from an area such as the West End into the East End?

The Witness: We did not take the patron opposition into account. We did it on the basis of distance, the time, and the age of the children, and the fact that it looked like to us that it would be very difficult for us to do any pairing without a lot of pairing.

[294] * * *

[The Court]

First, I believe you do not have a unitary system until I study it. It may be that you have no choice. I am not saying you don't. Where you have 19

schools that are racially identifiable, 12 right off-hand, just like that, and 7 just like that. The 7 white are even more glaring than the 12 Negro because of the racial population of the City of Richmond, 60-40. Now, that's just a—I just don't think at this stage it would be true, but I want to tell you this, Mr. Little: I am not satisfied at this stage that every reasonable effort has been made to explore, and I know that when I say this I am satisfied Dr. Little and Mr. Adams have been working day and night diligently to do the best they could, the school Board too. I know we get tired and discouraged and sometimes we think that is the end of it; and there are other things that perhaps can be done.

I have no intention—I don't think [295] that the Swann case—I think in conformance with the Swann case, I have no intention of saying that these schools are not going to open until the City of Richmond goes out and buys 200 new busses. Now then, don't be too happy. You all are waiting for a decision from the Supreme Court. All of us would like to have it. I am not sure, even when it comes that it is going to answer all the questions that the general public seems to have in their minds. It may just say no racial balance is necessary in every school. I think that's true. They may not even mention the word "bussing". But it seems to me it would be completely unreasonable to force a school system that has no transportation, and you all don't have any to any great extent, to go out and buy new busses when the United States Supreme Court may say that is wrong.

* * * * *

Letter of School Board to District Court

(Filed November 16, 1970)

November 13, 1970

The Honorable Robert R. Merhige, Judge
District Court of the United States
Eastern District of Virginia
Post Office Building
Richmond, Virginia 23219

Re: Civil Action No. 3353
Report from The School Board of the
City of Richmond

Dear Judge Merhige:

Pursuant to the directive of this Court as set forth in Paragraph 5 of the Order entered in this cause on August 17, 1970, the School Board of the City of Richmond, by counsel, submits this report covering steps taken in order to create a unity system in the Richmond Public Schools.

As the record discloses, the present plan approved by this Court on an interim basis was prepared pursuant to this Court's directive that the School Board follow the specific guidelines set forth by the Court of Appeals for the Fourth Circuit in the Norfolk and Charlotte cases. This report is submitted without prejudice to the rights of the School Board to contest the validity and applicability of these specific guidelines to the Richmond case and its right to re-examine its position in the event any of the guidelines is subsequently modified or held invalid. Similarly, the School Board submits this report without prejudice to its position that this Court erred in finding that the present plan was nonunitary and that the implementation of the

plaintiffs' plan would meet the test of reasonableness as presently defined by the Fourth Circuit. The School Board further reserves the right to re-evaluate its position upon the rendition of the anticipated decisions of the United States Supreme Court in the *Swann* v. *Charlotte-Mecklenburg* and other cases argued on October 12-14, 1970.

In view of the present lack of preciseness and uncertainty regarding the extent of its admitted affirmative duty to disestablish its former dual system of schools, the School Board, with the view of being able to implement a new plan at the earliest practicable date, is in the process of preparing three definitive new plans for the operation of public schools within the City of Richmond. This planning is being done on the assumption that the aforementioned forthcoming decisions of the United States Supreme Court will more clearly delineate the extent and scope of the affirmative duty resting upon it. The School Board is making plans based upon the most likely alternatives and directives to be enunciated by the Supreme Court in the aforesaid cases.

The first essential step in the preparation of these plans involves the preparation of current spot maps showing the precise residence of each enrollee in the public schools of the City. It is anticipated that these spot maps for all elementary students will be completed by November 16, 1970, and for all secondary students by December 1, 1970. In a normal school year, such spot maps could have been prepared approximately 30 days earlier, but additional time is required this year because of the tremendous shifting of pupils occasioned by the implementation of the present plan and the delayed enrollment of many students this year. In addition, the spot maps would not be realistic until the completion of the efforts to locate approximately

3,500 students whose enrollment had been previously anticipated. Considerable time and effort is being spent at this time to complete this task.

It is anticipated that the three definitive plans will be completed on or before January 15, 1971.

Under the organization pattern for all three plans, the elementary level will consist of Grades K through the 5th Grade; the middle schools will consist of Grades 6 through 8; and the high schools will consist of Grades 9 through 12. The only variations from this organizational concept will be those necessitated either by the number of students involved or the availability of appropriate buildings.

One of the plans will be predicated on normal geographical zoning for all three levels within the system. The basic criteria of this plan will be proximity and accessibility of students to existing schools but with a view of integrating to the extent possible when geographic zoning alone is used as a basic criteria.

With respect to the second plan, the elementary level assignments will be based on normal geographic zoning with an effort of combining proximity and accessibility with the integration of as many schools at the elementary level as will be feasible under reasonable geographic zoning. In this second plan every middle school and high school will be integrated to a substantial degree to the extent white students are available. The plan will also embrace the concept of providing integrated learning experiences for those elementary students who under normal geographic zoning will of necessity be in predominantly white or predominantly black schools.

The third plan being prepared is designed to cover the possibility that the forthcoming decisions of the United States Supreme Court will spell out an affirmative duty on

the part of the School Board to develop a plan which will require a substantial degree of integration within every school in the system. This plan will be an alternative to that plan previously submitted to this Court by the plaintiffs. The School Board concurs in the testimony of Dr. Foster given in this case to the effect that if every school within the system must be integrated, considerable improvements both from a logistical and educational standpoint can be made in the formulation of a plan similar to the one he presented. This third plan will involve more transportation of pupils than is required under the plan approved by this Court on an interim basis. It will involve considerable additional pairing of many schools within the system requiring the transportation of approximately one-half of the students in each paired school to the other school. Subject to adjustments which will be made upon the completion of the plan, it is anticipated that this plan will require the transportation of approximately 7,500 to 8,000 additional students. This in turn would require the purchase of approximately 120 buses at an average cost of $7,500.00 each for a total initial capital expenditure of approximately $900,000.00. In addition, the total anticipated operating expenses for these additional 120 buses is estimated to be $384,000.00 per school year. Under past practices of the State Board of Education, the School Board of the City of Richmond would receive reimbursements toward these operating expenses in the approximate amount of $168,000.00, which would result in a net operating cost to the Richmond School Board of approximately $216,000.00 per school year. Under present laws and practices, there will be no state reimbursement for any initial capital outlay or for subsequent replacement of automotive equipment.

Letter of School Board to District Court

Based on recent inquiries made of Baker Equipment Engineering Company, Smith-Moore Body Company, Inc., and Crenshaw Equipment Company, the School Board is advised that new buses can be obtained within 90 to 120 days of the date an order is placed for such equipment. This estimated delivery date would, of course, be altered in the event of any prolonged strikes or in the event that a tremendous demand is made on the suppliers as a result of desegregation decrees throughout the country.

Previous testimony in this case has established the procedures followed for the appropriation of school funds and has also established the current financial predicament of the City of Richmond.

Finally, it is the considered judgment of the school administration and the Richmond School Board that the implementation of any significant changes in the present plan during this school year would produce irreparable damage to the public school system. The system's ability to absorb as well as it has the dramatic changes occasioned by the implementation of the present plan attests to the viability of the system as a whole, but the implementation has not been made without a substantial deleterious effect on the system. The massive relocation of teachers and students has been accompanied by the as yet unexplained loss of approximately 3,500 students. Even more significantly, the tremendous logistical and administrative problems have had their predictable effect upon the normal educational program within the schools. These problems generated are being resolved as quickly as possible, but the administration has been strained to the utmost. In light of the foregoing, the School Board urgently requests this Court to weigh the easily anticipated drastic effect on the entire system if additional sweeping changes are ordered

to be implemented during this present school year. The School Board of the City of Richmond intends fully to comply with all requirements and directives of the United States Supreme Court as said requirements and directives are interpreted by this Court. It is in a posture of preparing itself to meet whatever directives may be forthcoming, but it must have reasonable time to implement any additional significant changes which might be required.

Respectfully submitted,

THE SCHOOL BOARD OF THE CITY OF RICHMOND

By GEORGE B. LITTLE
Of Counsel

Excerpts from Transcript of Proceedings of November 18, 1970

[35] • • •

The Court: While we are here, what is the status?

Mr. Little: The status is this, sir: That after conferring with counsel for the plaintiffs we have reached agreement with respect to three of the proposed schools. We are unable to agree on the balance of the schools, and I would very strenuously urge the Court to try to set a date where we can present evidence with respect to other schools, particularly two of the three elementary schools in the annexed area.

The Court: If your motion, the joinder, is successful, as I am inclined to think at this stage, it probably will be subject to what I learn from these memoranda, would this complicate that issue?

Mr. Little: No, Your Honor, because before we met with the attorneys for the plaintiffs we re-examined the proposed site locations in light of three possible alternatives.

Number one, if the Supreme Court approves the basic concept of neighborhood or normal geographic school zones, [36] would they be applicable there?

Number two, if the Court is restricted to decreeing the unitary plan within the confines of the City of Richmond, would it work?

But we also considered and have considered and are ready to present evidence that even if we go further in this suit and are successful in consolidating the three school districts of the three adjoining localities, that the sites involved would be appropriate for that purpose as well.

Excerpts from Transcript of Proceedings of November 18, 1970

And we are most anxious to attempt to move forward to present additional evidence to this Court as to the propriety of moving ahead on these schools and as to the dire financial consequences that we are experiencing as a result of this injunction. Even above and beyond the real hardship that the people in the annexed area will have commencing in January and September, we of necessity, in view of the injunction, we will have to go to double shift operations.

So I do respectfully ask the Court, while all counsel are present in the pending suit, that we attempt to get a date for a hearing on the injunction.

* * * * *

[37] * * *

[Mr. Lucas] With respect to the construction matter, I would like to advise the Court that we have had Dr. Foster, who testified in this court, come in and go with the school officials to inspect the various sites. And after counselling with Dr. Foster in terms of his experience as an administrator we did agree to the three locations indicated, and based upon the considerations Mr. Little has related, we object to all the rest. And whatever time the Court sets a hearing, we of course will be available.

* * * * *

Letter of Counsel for Plaintiffs

(Dated January 6, 1971)

Mr. George B. Little
Attorney at Law
1510 Ross Building
Richmond, Virginia 23219

Re: Bradley, et al., v. School Board of the City of Richmond, Virginia
Civil Action No. 3353

Dear Mr. Little:

I am enclosing herewith a summary recap of the fees and a separate attached sheet showing expenses to date in this matter. The first part of the fees covers the period beginning with the motion for further relief through August 11, 1970.

Two lawyers, one more than ten years experience (LRL), second lawyer four years experience, chiefly school cases, Legal Defense Fund, 32 days out of office, in and around Richmond, average 10 hours per day, at $45.00 per hour	$28,800.00
Same lawyers, 5 days office work, minimum of 8 hours per day, at $45.00 per hour	20,000.00
Two associate lawyers with more than ten years experience, local Richmond Bar, 3 days pretrial preparation, minimum 10 hours per day, at $45.00 per hour	2,700.00
Two lawyers, 10 days trial, not active in participation, 8 hours per day, at $45.00 per hour	7,200.00

Letter of Counsel for Plaintiffs

Additional hours subsequent to 8-11-70

Preparation of motion for summary reversal in 4th Circuit, two lawyers (LRL and NJC) 5 hours NJC; 2 hours LRL; at $45.00 per hour	315.00
Opposition to stay request for both District Court and Supreme Court, including travel time—20 hours NJC; 2 hours LRL; at $45.00 per hour	990.00
Pretrial conference in Richmond, NJC, including travel time, 10 hours at $45.00 per hour	450.00
Preparation of amended complaint, including travel time; 40 hours NJC; 20 hours LRL; at $45.00 per hour	2,700.00
November 17, 18—hearing on motion to add parties, LRL, including travel time, 25 hours at $45.00 per hour	1,125.00
November 28—to Miami for depositions, including travel time, LRL, 12 hours at $45.00 per hour	540.00
TOTAL FEES	$46,820.00
TOTAL EXPENSES	13,327.56
GRAND TOTAL FEES AND EXPENSES	$60,147.56

Very truly yours,

RATNER, SUGARMON & LUCAS
Louis R. Lucas

LRL:bc
enc

Submission of Desegregation Plans for 1971-72

(Filed January 15, 1971)

The Honorable Robert R. Merhige, Judge
District Court of the United States
Eastern District of Virginia
Post Office Building
Richmond, Virginia 23219

Re: Civil Action No. 3353

Dear Judge Merhige:

Pursuant to its Report of November 13, 1970, the School Board of the City of Richmond, by counsel, submits three new plans of operation for the Richmond Public Schools for the 1971-72 school year.

These plans are submitted without prejudice to the rights of the School Board to contest the validity and applicability of the specific guidelines set forth by the Court of Appeals for the Fourth Circuit in the Norfolk and Charlotte cases to the Richmond case and its right to re-examine its position in the event any of the guidelines is subsequently modified or held invalid. Neither should the submission of these plans be taken as a waiver of the position of the School Board that this Court erred in finding that the present plan was non-unitary and that the implementation of the planitiffs' plan would meet the test of reasonableness as presently defined by the Fourth Circuit.

Furthermore, it should be pointed out that the School Board's three new plans are based upon the most likely alternatives and directives expected to be enunciated by the United States Supreme Court in its decisions in the *Swann* and other cases argued on October 12-14, 1970.

Submission of Desegregation Plans for 1971-72

Under the basic organizational pattern for all three plans, the elementary level consists of Grades K through the 5th Grade; the middle schools consist of Grades 6 through 8; and the high schools consist of Grades 9 through 12. The variations from this organizational concept are those necessitated either by the number of students involved or the availability of appropriate buildings.

Plan I is predicated on the concept of proximal geographic zoning for all three levels within the system. The basic criteria of this plan will be the proximity and accessibility of students to existing schools but with a view of integrating to the extent possible when proximal geographic zoning alone is used as a basic criteria.

In Plan II the elementary level assignments are based on proximal geographic zoning combined with pairing of contiguous school attendance areas. All middle and high schools are integrated to a substantial degree.

Plan III is submitted to cover the possibility that the United States Supreme Court will place an affirmative duty on every school board to implement a plan requiring a substantial degree of integration within every school in the system. This plan is an alternative to the plan as submitted by the plaintiffs in this case. Transportation details will be furnished to the Court no later than January 20, 1971.

If the School Board is required to implement elementary Plan III, it will recommend to the Richmond City Council the purchase of transportation equipment to enable the School Board to furnish the transportation required thereunder. The Court will recall that this record demonstrates that VTC would not be able to provide this additional transportation. Moreover, if these very young children are required to be transported, their safety and well-being could only be assured through the utilization of equipment over which the School Board has complete control.

Submission of Desegregation Plans for 1971-72

The School Board is currently in the process of completing attendance zone or line descriptions for the elementary, middle and high schools, and will submit these exhibits forthwith.

Finally, I am enclosing a copy of Mr. L. D. Adams' letter to me of January 15, 1971, in the second paragraph of which he explains how arrangements were made to handle the elementary school students returning to the Richmond School System from Chesterfield at the beginning of the 1971-72 school session. The considerable overcrowding involved in making these arrangements makes it imperative that the injunction against construction be lifted at the earliest practicable date.

Respectfully submitted,

THE SCHOOL BOARD OF THE CITY OF RICHMOND

January 15, 1971

Mr. George Little, Attorney
1510 Ross Building
801 East Main Street
Richmond, Virginia 23219

Dear Mr. Little:

I am submitting to you today three plans of operation for the Richmond Public Schools for the 1971-72 school year, in accordance with our understanding that they might be considered in light of more definitive rulings by the Supreme Court which are expected sometime during this school year.

You will note that we have made arrangements to handle the elementary school population being returned to us from Chesterfield County at the beginning of the 1971-72 school

session. We have planned to accommodate these students by removing the sixth grade from the elementary schools in the newly annexed area, by changing one additional elementary school to middle school use, by overcrowding in all middle and secondary schools, as well as going beyond the 90% capacity figure that we use in all elementary schools. The 90% capacity figure is essential because our class size is now 27, whereas our capacity figure is based on a class size of 30 pupils.

It is the intent of the School Board to request from City Council such School Board-owned transportation facilities as may be needed in addition to those provided by public carrier and as required in the implementation of an approved school desegregation plan.

Sincerely,

/s/ L. D. ADAMS
L. D. Adams
Superintendent

Excerpts from Transcript of Proceedings of February 16, 1971

[17] • • •

The Court: That is one of the reasons that I have come to the conclusion that I must enter an order, preferably by April 1, and the school board just has to do the best they can. I am sorry. I don't mean to put it that way, but this matter in 1967, everybody knew what they had to do. All you had to do was read the law. Nothing was done. You can't go on and on and on.

I am hoping, of course, we will have the United States Supreme Court opinion down by then, but we might not.

The circuits are now beginning to say, and I am satisfied my circuit is going to say it, we can't wait. Just can't wait.

That may be a subtle way of suggesting to our betters in Washington that they ought to move along. I don't know.

But be that as it may I don't think it is fair to the school boards or the people to wait because we could get up into August. I cannot approve the interim plan outside a mandate from the Fourth Circuit for next year.

If there had been any other way it wouldn't have been approved this time, but we had no choice. It was either [18] the schools stayed closed or they operated under an illegal operation. Freedom of choice, which admittedly was not feasible, or we had to do the best we could.

So I want that entered. I want that done by April 1. I am sorry. I am sure arrangements can be made. That gives people five months. April, May, June, July, August, that's right, five months.

• • • • •

Excerpts from Transcript of Proceedings of March 4, 1971

[25] • • •

By Mr. Little:

Q. Basically let's come to Plan I just for one or two questions.

For what purpose was Plan I presented to the Court? A. [Mr. Adams] Well, the Plan I is based entirely on what we have called proximal geographic zoning which is exactly what that says. A placing of the students most conveniently to school buildings. We do that for two reasons. One is that in the event that the Supreme Court might rule that that system of zoning is acceptable then we would be on record with a plan.

Secondly, that a proximal geographic zoning does serve as the base for any other plans since you have to make your spot counts in those areas in terms of any pairing or any other type of zoning that you might use. So you would almost have to start from that position in any plan that we developed from that point.

[42] • • •

The Court: Well, you all know what the Court has said before, that it may be—well, we ought to contemplate that there may be some expression in the law which would advocate neighborhood schools for children in grades one through five within, I think, a mile and a half is a reasonable thing, but it may be something different and then everybody else gets bused, which I personally think would be the best way to accomplish what is necessary, but be that as it may we are going to have to do what the courts say.

• • • • •

Letter of Counsel for the School Board

(Dated March 11, 1971)

March 11, 1971

Louis R. Lucas, Esquire
525 Commerce Title Building
Memphis, Tennessee 38103

Re: Bradley, et al., v. The School Board of the City of Richmond

Dear Mr. Lucas:

Enclosed are revised copies of information you requested concerning fees paid and costs incurred by the School Board in the above-styled case.

The change reflected in these latest figures was necessitated by the location of two additional bills on behalf of Mr. Henry T. Wickham, Esquire, for the period December, 1962, to June 1, 1963, and the period January 1, 1964, to June 1, 1965.

The School Board was requested solely by the City Attorney's Office for the period dating from the filing of the original complaint to December, 1962, when Mr. Wickham was retained as special counsel.

It is our understanding that these enclosures are for your information only, and, accordingly, will be held in strictest confidence.

If you have any questions regarding this matter, please do not hesitate to contact me.

Very truly yours,

/s/ George B. Little
George B. Little

Letter of Counsel for the School Board

GBL:app
Enclosures

CC: The Honorable Robert R. Merhige, Jr., Judge
Norman J. Chachkin, Esquire

March 9, 1971

(Superseding March 2, 1971)

Bradley v. School Board, City of Richmond, Virginia

1. Records of all fees paid or due to attorneys for the School Board in the above-styled case since the date it was filed:

   (1) Tucker, Mays, Moore & Reed (firm name changed later to Mays, Valentine, Davenport & Moore)

   Henry T. Wickham,
   Attorney of Record

December 1962 —June 1, 1963	$ 2,500.00	
June 1, 1963 —December 31, 1963 ..	1,980.00	
January 1, 1964 —June 1, 1965	2,100.00	
May 1965 —May 1966	2,190.00	
May 1, 1966 —December 22, 1966 ..	90.00	
March 1970 —August 1970	15,000.00	
		$23,860.00

Letter of Counsel for the School Board

(2) Browder, Russell, Little
& Morris

George B. Little,
Attorney of Record

July 30, 1970 —September 4, 1970 ..	$17,343.75	
September 5, 1970 —December 31, 1970 ..	33,139.58	
January 1, 1971 —February 26, 1971 ..	13,750.00*	
		$64,233.33

*estimated

(3) Jeffreys & Lawler
J. Edward Lawler,
Attorney of Record

July 30, 1970 —September 30, 1970	$ 7,540.00

Excerpts from Transcript of Proceedings of April 16, 1971

[13] * * *

Mr. Chachkin: The only reason I bring that up, Your Honor, is that if we are forced to go to trial on schedule as to the Metropolitan aspect of the case, and the Fourth Circuit should grant a stay, we are going to be put to a very severe choice between protecting the relief that we already have by going to the Supreme Court and continuing on with further additional or new relief.

The Court: The only thing I can remind you of, Mr. Chachkin, is that you brought the suit. You brought every suit that you are involved in.

Mr. Chachkin: If the Court will recall the circumstances of the Metropolitan aspect of the case, the school board filed a motion to join and we were instructed to file an amended complaint.

The Court: I understand that, but I am talking about the original suit was filed by the plaintiffs. The [14] relief that was ultimately granted, recently, is a motion to stay, was relief that you all asked for. Well, not really what you asked for, but it was precipitated by your filing a suit. So I can't be sympathetic along those lines.

Of course you are not looking for sympathy.

Mr. Chachkin: I am not looking for sympathy, Your Honor. I realize how strange it is for the plaintiffs to be asking for a continuance. This is the first time we have ever asked for any delay in this case, to my knowledge.

It is unusual for plaintiffs in a school desegregation case to ask for delay.

I don't see how this case can be tried in two weeks, adequately.

The Court: I plan to work you nights, Saturdays.

Mr. Chachkin: I was anticipating that, Your Honor. I recall the trial last year.

I am still forced to the conclusion that it will be very difficult to adequately present the issues, even on that schedule, in that period of time.

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[23] • • •

The Court: Tell me the rush in trying this case, Mr. Little. I really haven't concluded as to the motion, whether [24] it should be granted or not.

I don't understand the rush except all school matters ought to be handled as expeditiously as possible. I told you before, I told you when you made your motion for modification of the other order, you mentioned during the course of your argument this aspect of the case and I told you that under no circumstances was I going to be rushed into a decision on it. I was going to do it the best I could, expedite it. I try to do that in all cases. I am not going to work under deadlines with a matter of this importance. I want you to understand that.

Mr. Little: Your Honor, let's start right with that point. What is the urgency in this case?

Our basic problem is, without getting into the merits, our basic problem in this case is that the rights to equal educational opportunities and equal plaintiffs' full enjoyment of their constitutional rights to equal educational opportunities and to equal education cannot be afforded within the confines of the City of Richmond. That the full complete relief

to which they are entitled can only be afforded through a consolidated—the implementation of a consolidated plan.

So we are talking about constitutional rights of plaintiffs. I find myself in a unique position today because I have the pleasure of repeating to this Court what this Court [25] has so often repeated to the School Board of the City of Richmond. Assuming our theory is sound, and I think we can certainly assume it for the purposes of this motion, we would not object to a delay of a week or two or something like that. But as this Court has indicated approximately 12 lawyers have cleared their dockets, the Court has cleared its docket and the earliest this case could be back in court would be in August, at the earliest. I submit that any delay like that, if we are correct that the consolidated plan is the only one that will afford complete and effective relief, realistically speaking, in all probability we are talking about an additional year's delay in the implementation of a plan.

Now, it is all well and good to speculate on stays and so forth, but this Court in the past when previous suggestions along this line have been made has answered very wisely and said, "I have no control over what other Courts do, but I recognize my duty with respect to the rights of these plaintiffs."

I don't think the possibility of a year's delay in the implementation of the relief sought can be reconciled with the very specific pronouncements of the Supreme Court which have been repeatedly and correctly reaffirmed by this Court that the time—

The Court: Say that again.

[26] Mr. Little: Sir?

Excerpts from Transcript of Proceedings of April 16, 1971

The Court: Say it again.

Mr. Little: I don't think that the probability of a year's delay in the implementation of a unitary plan, what we consider to be the full and complete relief to which the plaintiffs are entitled, can be reconciled with the very clear pronouncements of the Supreme Court which this Court has previously adhered to.

The Court: I thought you said something about and correctly.

Mr. Little: I said correctly. I was giving you credit for following the law of the land, sir. That's right.

I think the Court is inclined to do that. I don't think the possibility of this delay can be reconciled with the language in the cases with which this Court is all too familiar. This requires at once action. I think this is why there is a material question about the propriety of any continuance.

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[28] • • •

[Mr. Little] I call the Court's attention to things that it is well aware of. Number one, Mr. Chachkin and Mr. Lucas are supremely competent counsel. I don't know of any counsel more versed in cases—

The Court: Be careful now. I still have their motion for counsel fees under advisement.

[29] Mr. Little: Well, sir, this is a new motion.

The Court: All right.

Mr. Little: These gentlemen, Mr. Chachkin is employed by the Legal Defense Fund which has a battery of the most sophisticated lawyers in school desegregation cases in the country.

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Excerpts from Transcript of Proceedings of April 23, 1971

[8] [The Court] In addition I would like to know, and maybe you can address yourselves to this right now and get it behind me, Mr. Little, of what is the possibilities of delay in the Richmond opening for lack of transportation facilities?

The reason I am asking it now is it so happens that I have got or received a letter today in connection with another city's transportation situation and the letter indicates that very fortunately their order was in time, but that they have been assured of delivery by midsummer. A week's delay in ordering would have meant delivery after Labor Day for that particular city and their buses. I don't recall how many they were ordering so I don't know. It may be that you all are going to be delayed anyway.

Do you know? Is your position the same now?

Mr. Little: As of yesterday, sir, the school board has ordered 56 and been promised delivery. We have requested additional appropriations from Council for additional sums so that we will have 120 buses.

Dr. Little has done a lot of prior planning, which I think puts us in a position of saying that we will have 120 buses here by September 1st.

The Court: I see.

Well, what you are saying in effect is that [9] transportation would not preclude you from opening on time?

Mr. Little: No, sir.

The Court: Well, that is helpful in any event to know that.

* * * * *

Excerpts from Transcript of Proceedings of April 23, 1971

[36] • • •

[The Court] I don't mean to cut the plaintiffs off from their views that they may have. If you have any, gentlemen, I will be glad to hear from you.

Mr. Page, Mr. Olphin, in this connection with the matters that we are discussing today, do you have any views?

Mr. Page: Your Honor, at this time all of the indications from Mr. Chachkin are, one of the counsel for the plaintiffs, is to the effect that certainly agreements have been made with the Chesterfield and County of Henrico for discovery depositions by June of this year with the idea that the case would be tried on or after August 23, 1971. Mr. Chachkin and Mr. Lucas are now preparing for Detroit cases and I don't think they will be consummated until August of this year.

The Court: All right, sir.

Mr. Page: So therefore counsel for plaintiff here this morning could not join in concert with anything contrary to the information I am now revealing to the Court.

The Court: Well, I appreciate your views. I asked for them and I am appreciative of them.

[37] I have no reason to change it. I already found that the plaintiffs were not entitled to their continuance and I don't change that. I still feel the same way. I am sorry about their conflict, but all counsel, these gentlemen were put in a position, they were told in the beginning that you better get other help if you need it. You are going to have to try this case when the Court can try it. They all acquiesced and went along.

Certainly Judge Roth was very cooperative out in Detroit, but that can't be helped.

I will tell you and Mr. Olphin, Mr. Page, you are the local lawyers. You are the ones to whom the Court looks. They may have to change their dates on depositions, I don't know.

Excerpts from Transcript of Proceedings of May 17, 1971

[6] • • • •

[The Court] Now, gentlemen, on the trial date. First let me say this: I am not going to continue it simply because counsel says they are not ready because I don't believe counsel will ever be ready to their full satisfaction Very few are ready for a case. But I have a motion for a continuance, the second or third one, from the plaintiffs, the Board of Supervisors of Henrico and Chesterfield, the the State Board of Education, all saying that they simply cannot do justice to the case.

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Memorandum Opinion of District Court

(Filed May 26, 1971)

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

CIVIL ACTION NO. 3353-R

CAROLYN BRADLEY, etc., *et al.*,

v.

THE SCHOOL BOARD OF THE
CITY OF RICHMOND, VIRGINIA, *et al.*

This class action, brought ten years ago in an effort to end racial discrimination in the operation of public schools in Richmond, Virginia, is before the Court on a motion for attorneys' fees. An appropriate ruling on the pending motion requires an abridged review of events since March of 1970.

On March 10, 1970, a motion for further relief was filed in this case, and after extensive hearings this Court ordered into effect an interim desegregation plan prepared by the School Board for the school year 1970-71, *Bradley* v. *School Board of City of Richmond*, 317 F. Supp. 555 (E.D. Va. 1970), and later, a plan for 1971-72, *Id.*, 325 F. Supp. 828 (E.D. Va. April 5, 1971). Appended to the motion for further relief was an application for an award of reasonable attorneys' fees, to be paid by the City School Board. In light of the defendants' conduct before and dur-

ing litigation, and by reason of the unique character of school desegregation suits, justice requires that fees should be awarded.

This case lay dormant from 1966 until the motion of March, 1970. During that period the city schools were operated under a free choice system of pupil assignment. The plan was approved by the court of appeals, *Bradley* v. *School Board of City of Richmond*, 315 F.2d 310 (4th Cir. 1965), but the case was remanded for further hearings on faculty assignments by the Supreme Court, *Bradley* v. *School Board of the City of Richmond*, 382 U.S. 103 (1965). After some further district court proceedings the case lay idle until 1970.

When the suit was reactivated the defendants were directed, pursuant to this Court's usual practice in school desegregation cases, to state on the record whether they contended that the schools were then operating as a unitary system, and, if not, what period of time would be required to formulate a constitutional plan. In open court, albeit reluctantly, the defendants admitted that the Constitution was not being complied with;[1] they were ordered on April 1, 1970, to submit a unitary plan on or before May 11, 1970. Hearings were set for June, and the parties were admon-

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[1] Of course, it scarcely excuses the School Board's continued operation under an invalid plan that they were under an outstanding court order to do so. Legal requirements change; what is consistent, moreover, with a pace of deliberate speed at one time should not be confused with the ultimate goal. The school system was in violation of outstanding authoritative decisions, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 431 F.2d 138, 141 (4th Cir. 1970), rev'd. in part, 402 U.S. 1 (April 20, 1971). To await the plaintiffs' initiation of legal action may have seemed a wise strategic choice, but it cannot be equated with the fulfillment of the affirmative duty to desegregate.

ished as to the necessity of implementing a unitary plan in the fall of 1970.

The Court will not restate its findings of fact and conclusions of law which resulted from the hearings of the summer of 1970; these are adequately covered in the reported decision. A few points relevant to the present motion should be stressed.

Although the School Board had stated, as noted, that the free choice system failed to comply with the Constitution, producing as it did segregated schools, they declined to admit during the June hearings that this segregation was attributable to the force of law (transcript, hearing of June 20, 1970, at 322). Hearings which the Court had hoped would be confined to the effectiveness of a plan of desegregation consequntly were expanded; the plaintiffs were put to the time and expense of demonstrating that governmental action lay behind the segregated school attendance prevailing in Richmond. Public and private discrimination were shown to lie behind the residential segregation patterns over which the School Board proposed to draw neighborhood school zone lines. Evidence on choice of school and public housing sites, restrictive covenants in deeds, discrimination in federal mortgage insurance opportunities, housing segregation ordinances, and continued practice of private discrimination was presented, most of it without cross-examination or serious attempt at refutation. All of this proof was clearly relevant, not only under *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*, 431 F.2d at 141, decided just prior to the hearings, but also under *Brewer* v. *School Board of City of Norfolk*, 397 F.2d 37, 41 (4th Cir. 1968).

At the same hearings the School Board presented a desegregation proposal developed by a team from the Depart-

ment of Health, Education and Welfare that was obviously unacceptable under law then current. It is hard to see how the Board could have contended otherwise, for its proposals achieved very little desegregation beyond what prevailed under the free choice system, which it had rightly declined to defend. These hearings were held more than two years after *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968) was handed down. Since that time it has been clear that compliance with the Constitution is not measured by the formal racial neutrality of a pupil assignment plan but rather by its effectiveness in extinguishing the public policy of segregation. Freedom of choice had left three of seven high schools all black and one nearly all white. It left five junior high schools out of eleven all black or nearly so and two nearly all white. Of forty-four elementary schools, twenty-two were substantially all black and eight almost all white, with several others containing a significant but still grossly disproportionate Negro enrollment. The School Board's desegregation proposal—the HEW plan—would have placed small minorities of the opposite race in the three formerly black high schools and would have left the white high school unchanged. Three junior high schools would have remained as obviously black facilities and there would have been two clearly white; and five almost 100% white and fifteen nearly all black elementary schools. Many other elementary schools could not strictly have been called all black or all white, but departed substantially from the systemwide ratio and would be readily identifiable racially.[2]

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[2] A full tabulation of the results projected under the HEW plan is given in *Bradley* v. *School Board of the City of Richmond*, *supra*, 317 F. Supp. at 564-65.

Not only did the results of the School Board proposal condemn it, but also it failed to pass legal muster because those who prepared it were limited in their efforts further to desegregate by self-imposed restrictions on available techniques. Consideration of residential segregation in drawing zone lines was omitted, except that it was decided at a late date to pair a few schools; transportation was not seriously considered as a desegregation tool, and in general, astonishingly, race was not taken into account in the formulation of the plan. Since 1966 it has been plain that school boards in this circuit may consider race in preparing zone plans. *Wanner* v. *County School Board of Arlington County*, 357 F.2d 452 (4th Cir. 1966). To bar this key factor from discussion would render impossible almost the first step in the Board's task of disestablishing the dual system. For failure to address itself to the legal duty imposed upon it by *Green*, that of taking affirmative action to desegregate, the plan was manifestly invalid. Furthermore, *Swann* held that busing and satellite zoning were legitimate integration techniques. *Swann* v. *Charlotte-Mecklenburg Board of Education, supra*, 431 F.2d at 145-46. A plan that failed even to experiment with these legitimate tools and yet left such substantial segregation should never have been proposed to the Court.

The School Board was directed to submit a further plan within a month's time, and hearings were held on the second proposal. At the conclusion of the June proceeding the Court had specifically called the parties' attention to recent appellate rulings fixing the extent of their obligation: *Brewer* v. *School Board of City of Norfolk*, 434 F.2d 408 (4th Cir.) *cert. denied* 399 U.S. 929 (1970); *Green* v. *School Board of City of Roanoke*, 428 F.2d 811 (4th Cir. 1970);

United States v. *School Board of Franklin City*, 428 F.2d 373 (4th Cir. 1970); *Swann* v. *Charlotte-Mecklenburg Board of Education, supra*, 431 F.2d. Under these precedents the School Board's second plan also failed to establish a unitary school system. Its deficiencies are fully treated in the Court's earlier opinion;[3] the most glaring inadequacy is the large proportion of elementary students placed in substantially segregated schools. The Fourth Circuit in *Swann* rejected an elementary plan which left over half the black elementary students in 86% to 100% black schools and about half the whites in 86% to 100% white schools. In the face of that ruling the School Board proposed a plan under which 8,814 of 14,943 black elementary pupils would be in twelve elementary schools over 90% black, and 4,621 of 10,296 white elementary pupils would attend seven 90% or more white schools. At the same time, although testimony in the June hearings by school administrators indicated a consensus that desegregation of such schools could not be achieved without transporting students, the School Board had in August still taken no steps to acquire the necessary equipment. Because by that time it was too late to do so by the beginning of the 1970-71 school year, the plaintiffs were forced to accept only partial relief in the form of the School Board's inadequate plan on an interim basis.

The order approving that plan included a direction to the defendants to report to the Court by mid-November the specific steps taken to create a unitary system and to advise the Court of the earliest date such a system could be put into effect.

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[3] *Bradley* v. *School Board of the City of Richmond, supra*, 317 F. Supp. at 572-76.

Appeals were noted by all parties, but efforts by the City Council to secure a stay, pursued at all levels, failed. On motion of the School Board, however, briefing was postponed by the Court of Appeals pending rulings by the Supreme Court on school desegregation cases then before that court. The effect of that order was to stay all appellate proceedings.

The School Board's November report stated only that three further desegregation plans were in preparation and would be submitted on January 15, 1971. These proposals were to be based on various assumptions concerning the Supreme Court's disposition of the cases before it.

In the meantime the School Board sought relief from the Court's outstanding order enjoining planned school construction. Depositions of expert witnesses were taken and the matter was submitted on briefs. The evidence disclosed that the School Board had not seriously reviewed the site and capacity decisions which it had made, according to earlier testimony, without consideration of their impact on efforts to desegregate. Rather it was reportedly determined that the sites chosen were compatible with various conceivable measures of the affirmative duty to desegregate, none of which was consistent with current decisions. Bases for the conclusions of compatibility, moreover, were not presented. The Court declined to lift the construction injunction. *Bradley* v. *School Board of City of Richmond*, —— F. Supp. —— (E.D. Va. Jan. 29, 1971).

In December, prior to consideration of the school construction issue, the plaintiffs moved for further relief effective during the second semester of the 1970-71 school year, stating that the defendants' report indicated that they did not intend further desegregation efforts during

the current year. The promised plans were filed in January.[4] The only proposal which promised more than an insubstantial advance over the inadequate interim plan, the School Board's Plan 3, required the purchase of transportation facilities which the School Board still would only say it would acquire if so ordered. In its November report the Board stated firmly its opposition to any mid-year modifications of the plan.

The Court declined to order further mid-year relief, *Bradley* v. *School Board of City of Richmond*, —— F. Supp. —— (E.D. Va., Jan. 29, 1971). Because of the nearly universal silence at appellate levels, which the Court interpreted as reflecting its own hope that authoritative Supreme Court rulings concerning the desegregation of schools in major metropolitan systems might bear on the extent of the defendants' duty, the Court felt that it would not be reasonable to require further steps to desegregate during the second semester, and particularly so in view of the expense of such steps and the likelihood that they could not become effective, on account of the delay in acquiring transportation facilities, until late in that semester. The fact remains, nonetheless, that the School Board had made effective and immediate further relief nearly impossible because it had not taken the specific step of seeking to acquire buses. This policy of inaction, until faced with a court order, is especially puzzling in view of representations later made by counsel for the School Board to the effect that at least fifty-six bus units would have to be bought, in the Board's view, in order to operate under

[4] They are described in this Court's prior opinion, *Bradley* v. *School Board of City of Richmond*, 325 F. Supp. 828 (E.D. Va., Apr. 5, 1971).

nearly any possible plan during the 1971-72 school year.

Finally, the Court heard further evidence on the plan to be implemented during 1971-72.[5] The School Board, as noted, offered three plans;[6] one only, as stated, would work to eliminate the substantial segregation that remained in Richmond schools. Plan 1 was a strictly contiguous geographic zoning system. Plan 2, at the elementary level, suffered from the same faults which had condemned the school administration's plan in *Swann* and the interim plan in this case. Plan 3 substantially eliminated the racial identifiability of numerous elementary facilities. But, although the Board prepared that plan, they did not urge its adoption but instead endorsed plan 2 for the 1971-72 school year. At the hearings, counsel for the School Board again stated that no further transportaiton units would be acquired unless the Court so ordered specifically, despite that the Court had found in August of 1970 that the interim plan did not achieve a sufficient level of desegregation and could be approved as a temporary expedient only in view of the lack of equipment necessary for further desegregation. The Court directed the adoption of plan 3 for the upcoming school year.

As a very general statement of the law, it is true that American courts do not reimburse the victorious litigant for the full price of his victory, his attorney's fees and expenses. See Goodhart, *Costs*, 38 Yale L.J. 849 (1929). Like most generalizations in law, this rule is subject to

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[5] The instant motion seeks only fees and expenses for litigation to January 29, 1971, but evidence of subsequent behavior of the defendants is relevant in that it tends to show a consistent policy, pursued at all stages of the case.

[6] Details of the proposals are given in *Bradley* v. *School Board of City of Richmond*, 325 F. Supp. 828 (E.D. Va., April 5, 1971).

several exceptions. The shape of these exceptions provides an example of the tensions existent in our system between two sources of legal rules: courts and legislatures. For the cases show that courts recognize a power in themselves, necessary at times in order fully to achieve justice, to direct that a losing litigant pay his opponent's attorney's fees. This power, if it has a statutory source at all, is conferred implicitly in the grant of equitable jurisdiction. At the same time legislative directives sometimes provide that a court may or must award a winning plaintiff reasonable counsel fees. Such statutes, not infrequently, form part of a more extensive legislative scheme which creates a legal right and the appropriate remedy for its violation. It is not difficult to see how legal doubts may arise as to the court's power in a certain case to direct the payment of fees. Most federal cases involve the vindication of statutory rights. In certain cases the question arises whether Congress, in omitting from legislation any provision for the award of counsel fees, intended to impose a restriction on available relief or intended instead to permit the courts to exercise the power resting in them under existing decisions. Conversely, where a fee award is specifically authorized, the question arises whether some different factual showing from that required under general equitable principles supports an award.

The plaintiffs do not argue that explicit statutory authorization exists for an award of counsel fees. The case is brought pursuant to 42 U.S.C. § 1983 and this Court's general equitable power to enforce constitutional protections; Congress has not mandated that judgments on such cases should as a matter of ordinary course include the payment of counsel fees. *Williams* v. *Kimbrough*, 415 F.2d 874 (5th Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970).

The case therefore presents an issue to be resolved on the basis of principles governing this Court's general equitable discretion, if discretionary power is available to the Court in matters of this nature. In seeking out whatever particular or special circumstances justify an award of attorney's fees, the Court must be mindful that this case should be compared not solely with other cases concerning school desegregation, but with all other types of litigation as well.

Sprague v. *Ticonic National Bank,* 307 U.S. 161 (1939), establishes that counsel fees and other litigation expenses, not taxable as costs by statute, may be awarded as part of a litigant's relief. "Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts," *id.,* 164. One circumstance in which an award may be an appropriate use of the power of equity is that in which an individual litigant by his activities creates or preserves a fund in which others than he may have an interest.[7] *Sprague* was such a case, in effect, but the Court in that decision declined to limit the equity court's power to any particular circumstances. "As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility . . . . In any event such allowances are appropriate only in exceptional cases and for dominating reasons of justice," *Id.,* 167.

Fleischmann Distilling Corp. v. *Maier Brewing Co.,* 386 U.S. 714 (1967), stresses that the principles allowing awards of counsel fees have no application in cases involv-

[7] See, *e.g., Trustees* v. *Greenough,* 105 U.S. 527 (1881); *Kahan* v. *Rosenstiel,* 424 F.2d 161 (3d Cir.), *cert. denied,* 348 U.S. 950 (1970); *Gibbs* v. *Blackwelder,* 346 F.2d 943 (4th Cir. 1965); *Mercantile-Commerce Bank v. Southeast Arkansas Levee District,* 106 F.2d 966 (8th Cir. 1939).

ing "statutory causes of action for which the legislature had prescribed intricate remedies," *Id.*, 719, not intended by Congress to include the payment of counsel fees. *Fleischmann* has, however, been followed by *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968), and *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970). In *Newman,* an action under the 1964 Civil Rights Act, 42 U.S.C. § 2000a, et seq., an enactment which provides in terms that its remedies are exclusive, 42 U.S.C. § 2000a-6(b), the Court held that a successful plaintiff should be awarded attorney's fees in the ordinary case, under a specific provision of the act. The Court noted, however, that such a sanction could have been imposed upon a defendant who litigated in bad faith for purposes of delay, *Newman* v. *Piggie Park Enterprises, supra,* 402 n. 4, even had Congress not authorized by statute an award of counsel fees.

In *Mills* the Court directed that a corporation reimburse plaintiffs in a derivative suit for their attorney's fees, despite that the statute involved made specific provision for attorney's fees only in sections other than that on which liability was predicated in the action. Congress' failure to establish precise bounds of possible relief for violation of its prohibitions (indeed the private right of action is implied) was thought to reflect an intention not to exclude the possibility of an award of attorney's fees under conventional principles. *Mills* v. *Electric Auto-Lite Co., supra,* 391. The Court directed an interim award on a variation of the fund theory.

Lower courts have also construed federal enactments, old and recent, not to bar an award of attorney's fees when equity would require it, in the absence of indicia of congressional purpose to render such relief unavailable. See

Lee v. *Southern Home Sites Corp.*, 429 F.2d 290 (5th Cir. 1970) (42 U.S.C. § 1982); *Kahan* v. *Rosentiel, supra,* (Securities Exchange Act § 10b, Rule 10b-5); *Local 149, International Union, Automobile, Aircraft and Agricultural Implement Manufacturers of America* v. *American Brake Shoe Co.*, 298 F.2d 212 (4th Cir.), *cert. denied,* 369 U.S. 873 (1962) (Labor Management Relations Act § 301).

Section 1983 and general federal equitable power to protect constitutional rights are not restricted by any congressional language indicating an intention to preclude an award of counsel fees, either by express exclusion or the creation of an intricate remedial scheme. The statute creates liability

> "in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

In its reference to suits in equity the statute must be taken to authorize relief, such as an award of counsel fees, as might normally be available in such suits. Case law prior to *Fleischmann* in school desegregation cases, discussed below, recognizes the power of a federal equity court trying a desegregation suit to award counsel fees. In the light of the decisions subsequent to *Fleischmann,* such construction of § 1983 is not subject to serious question.

The issue, then, is whether this case is a proper one for a discretionary award.

Many of the cases directing or approving an award of attorney's fees turn upon the fund theory: the concept that, first, a litigant's counsel fees have been expended in such a manner as to benefit a number of other persons, not participating in the suit, and that, second, means are avail-

able whereby such outside beneficiaries can be made to bear something like a pro rata share of expenses by taking the fee from a defendant (a fiduciary, often) who holds or controls something in which the beneficiaries have an interest. School desegregation cases, or any suits against governmental bodies, do not fit this fund model without considerable cutting and trimming. This is a class suit to be sure, with class relief, but to say that the plaintiff class will actually in effect pay their attorneys if the School Board is made to pay counsel fees entails a number of unproved assumptions about the extent to which pupils pay for their free public schooling.

Nonetheless, the fund theory does not exhaust the grounds on which an equity decree to pay counsel fees may be based. Other cases exist in which "overriding considerations indicate the need for such recovery." *Mills* v. *Electric Auto-Lite Co., supra,* 391-92; see Note, 77 Harvard L.Rev. 1135 (1964). Such considerations in general are present when a party has used the litigation process for ends other than the legitimate resolution of actual legal disputes.

In *Guardian Trust Co.* v. *Kansas City Southern Railway Co.,* 28 F.2d 233 (8th Cir. 1928), *rev'd on other grounds,* 281 U.S. 1 (1930), the Eighth Circuit reviewed exhaustively the circumstances in which an equity court might allow costs "as between solicitor and client" despite the lack of statutory authority. That court concluded that such a fee award was proper in a number of instances, including those in which a fiduciary has defended his trust, or a party has defended his title to certain property against baseless and vexatious litigation, or a defendant, charged with gross misconduct, has prevailed on the merits.

In *Rude* v. *Buchalter,* 286 U.S. 451 (1932), the Supreme Court held unwarranted an award of attorney's fees against

> which was required, as a bargaining agent, to protect their interests. The vindication of their rights necessarily involves greater expense in the employing of counsel to institute and carry on extensive and important litigation than the amount involved to the individual plaintiffs would justify their paying. In such situations, we think that the allowance of counsel fees in a reasonable amount as a part of the recoverable costs of the case is a matter resting in the sound discretion of the trial judge. *Id.*, 481.

Although the indication that such costs are proper if "essential to the doing of justice" in a sense begs the question, the factors mentioned give some guidance. The suit obviously benefited an entire class of Negro locomotive firemen. The defendant, equipped with legislatively-conferred bargaining powers, owed them something akin to a fiduciary's concern and had violated that duty. The resources of the parties were disproportionate. The cost of litigation was disproportionate to the monetary benefit to any one plaintiff. Last, the legal issues were relatively settled before suit. Analogous factors are present in the instant litigation.

In *Taussig* v. *Wellington Fund, Inc.*, 187 F. Supp. 179 (D. Del. 1960) *aff'd.* 313 F.2d 472 (3d Cir. 1963), *cert. denied,* 374 U.S. 806 (1963), a stockholders derivative suit charging unfair competition, the shareholder plaintiffs were awarded attorneys' fees not out of the treasury of their corporation, which their lawsuit presumably benefited, but against those guilty of unfair practices. Such an equitable damage award, the court said, must be premised on a finding that "the wrongdoers' actions were unconscion-

> which was required, as a bargaining agent, to protect their interests. The vindication of their rights necessarily involves greater expense in the employing of counsel to institute and carry on extensive and important litigation than the amount involved to the individual plaintiffs would justify their paying. In such situations, we think that the allowance of counsel fees in a reasonable amount as a part of the recoverable costs of the case is a matter resting in the sound discretion of the trial judge. *Id.*, 481.

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able, fraudulent, willful, in bad faith, vexatious, or exceptional," *Id.*, 187 F. Supp. at 222 (footnotes omitted).

Our own Circuit ruled that it was within the power of a court of equity to award attorneys' fees in a suit under § 301 of the Taft-Hartley Act to enforce an arbitrator's award if it were shown that the employer's refusal to comply with the award was arbitrary and unjustified. The decision was based on precedents establishing a court's equitable power and on the judicial duty to develop a body of federal law under § 301. In the particular case the litigation was justified, and a fee award improper, because questions of some legal substance remained. *Local 149, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America* v. *American Brake Shoe Co., supra.*

In *Vaughan* v. *Atkinson*, 369 U.S. 527 (1962), attorneys' fees as an item of damages or an admiralty case were held due when the owner's conduct toward an ill seaman was consistently stubborn:

> In the instant case respondents were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that recalcitrance, libellant was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old. The default was willful and persistent. *Id.*, 530-31.

A district court in another case declined to exercise its acknowledged equity power to award attorneys' fees in a suit against a labor union, finding no "fund" had been created and no compelling circumstances otherwise existed. The court commented, however, that:

Memorandum Opinion of District Court in Bradley Action

> [W]ith the possible exception of civil rights litigation, see *Bell* v. *School Bd.*, 321 F.2d 500 (4th Cir. 1963), 77 Harv. L. Rev. 1135 (1964), no area is more susceptible to the salutary effects of the exercise of the chancellor's power to award counsel fees without the presence of a fund than litigation involving a member and his union. Primarily, this litigation seeks solely equitable relief and traditionally puts an impecunious group of members against a solvent union with little expectation of a substantial monetary award from which to pay a counsel fee, even a contingent one. This recognition has prompted several courts to allow counsel fees to successful union members who through litigation have corrected union abuse even though they have not established a fund or conferred a pecuniary benefit upon the commonwealth of the union. *Cutler* v. *American Federation of Musicians*, 231 F. Supp. 845 (S.D. N.Y. 1964), *aff'd.* 366 F.2d 779 (2d Cir. 1966), *cert. denied*, 386 U.S. 993 (1967).

A class suit to reapportion a local government unit, *Dyer* v. *Love*, 307 F. Supp. 974 (N.D. Miss. 1969), was the context for an award of counsel fees in a civil rights case. When the defendants, members of a board of supervisors, declined to reapportion their constituents, despite gross population variations between districts, and instead forced citizens to initiate "vigorously opposed" litigation, the court found this "unreasonable and obstinate" conduct to be fair basis for a fee allowance, even though there had been no Supreme Court holding during most of the suit's pendency explicitly defining the defendants' duty, *Id.*, 987. The direction of the developing law, the court said, should have

been clear. Additionally, the court held that the absence of any fee agreement between plaintiffs and their lawyer constituted no bar to an award, because it was within the court's power to order payment to the attorneys themselves.

In another case out of the same court, an allowance of counsel fees was denied when the losing defendants, public educational administrators, were found not to have presented their defenses "in bad faith or for oppressive reasons," *Stacy* v. *Williams*, 50 F.R.D. 52 (N.D. Miss. 1970).

In *Lee* v. *Southern Home Sites Corp.*, *supra*, the Fifth Circuit authorized attorneys' fee awards in a suit under 42 U.S.C. § 1982 contesting racial discrimination in housing sales, relying on the directive in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), to fashion appropriate and effective equitable remedies for § 1982 violations. The discretionary power clearly exists, the court said, and its exercise is especially appropriate in civil rights cases, where often discrimination with wide public impact can be terminated only by private lawsuit and problems of securing legal representation have been recognized. However, because the district court's exercise of its discretion could only be reviewed on the basis of factfindings on the relevant issues, the case was remanded for further proceedings.

Numerous other cases support the power of a court of equity to allow counsel fees when a litigant's conduct has been vexatious or groundless, or he has been guilty of overreaching conduct or bad faith. See *Siegel* v. *William E. Bookhultz & Sons*, 419 F.2d 720 (D.C. Cir. 1969); *Smith* v. *Allegheny Corp.*, 394 F.2d 381 (2d Cir.) *cert. denied*, 393 U.S. 939 (1968); *McClure* v. *Borne Chemical Co.*, 292 F.2d 824 (3d Cir.) *cert. denied*, 368 U.S. 939 (1961); *In re Carico*, 308 F. Supp. 815 (E.D. Va. 1970); *Stevens* v. *Abbott, Proctor & Paine*, 288 F. Supp. 836 (E.D. Va. 1968).

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School desegregation decisions illustrate the specific application of a court's equitable discretion to allow counsel fees to plaintiffs when the evidence shows obstinate noncompliance with the law or imposition by defendants on the judicial process for purposes of harassment or delay in affording rights clearly owing. See, e.g. *Nesbit* v. *Statesville City Board of Education*, 418 F.2d 1040 (4th Cir. 1969); *Williams* v. *Kimbrough, supra; Cato* v. *Parham*, 403 F.2d 12 (8th Cir. 1968); *Rolfe* v. *County Board of Education of Lincoln County*, 391 F.2d 77 (6th Cir. 1968); *Hill* v. *Franklin County Board of Education*, 390 F.2d 583 (6th Cir. 1968); *Clark* v. *Board of Education of Little Rock School District*, 369 F.2d 661 (6th Cir. 1966); *Griffin* v. *County School Board of Prince Edward County*, 363 F.2d 206 (4th Cir. 1966); *Kemp* v. *Beasley*, 352 F.2d 14 (8th Cir. 1965); *Bradley* v. *School Board of City of Richmond, supra*, 345 F.2d; *Rogers* v. *Paul*, 345 F.2d 117 (8th Cir.) *rev'd on other grounds*, 382 U.S. 198 (1965); *Brown* v. *County School Board of Frederick County*, 327 F.2d 655 (4th Cir. 1964); *Bell* v. *County School Board of Powhatan County*, 321 F.2d 494 (4th Cir. 1963); *Pettaway* v. *County School Board of Surry County*, 230 F. Supp. 480 (E.D. Va.) *rev'd on other grounds*, 339 F.2d 486 (4th Cir. 1964). See also, *Felder* v. *Harnett County Board of Education*, 409 F.2d 1070 (4th Cir. 1969), concerning Appellate Rule 38 and "frivolous" appeals.

A prior appellate opinion in this case states that district courts should properly exercise their power to allow counsel fees only "when it is found that the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obstinate obduracy." *Bradley* v. *School Board of City of Richmond, supra*, 345

F.2d at 321. The Court of Appeals recognized that appellate review of such orders, however, necessarily had a narrow scope and failed to disturb a nominal fee award.

In determining whether this particular lawsuit was unnecessarily precipitated by the School Board's obduracy, the Court cannot "turn the clock back," *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 492 (1954), to 1965. The School Board's conduct must be considered with reference to the state of the law in 1970. The Court has already reviewed the course of the litigation. It should be apparent that since 1968 at the latest the School Board was clearly in default of its constitutional duty. When hailed into court, moreover, it first admitted its noncompliance, then put into contest the responsibility for persisting segregation. When liability finally was established, it submitted and insisted on litigating the merits of so-called desegregation plans which could not meet announced judicial guidelines. At each stage of the proceedings the School Board's position has been that, given the choice between desegregating the schools and committing a contempt of court, they would choose the first, but that in any event desegregation would only come about by court order.

Other courts have catalogued the array of tactics used by school authorities in evading their constitutional responsibilities, *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*, 402 U.S. at 13 (April 20, 1971) (slip opinion at 9); *Jones* v. *Alfred H. Mayer Co.*, *supra*, 448 n.5 (1968) (Douglas, J., concurring); *Wright* v. *Council of the City of Emporia*, No. 14,552, 442 F.2d 570, 593 (4th Cir. 1971) (slip opinion at 13-14) (Sobeloff, J., dissenting). The freedom of choice plan under which Richmond was operating clearly was one such. When this Court

filed its opinion of August 17, 1970, confirming the legal invalidity of that plan, the HEW proposal, and the interim plan, it was not propounding new legal doctrine. Because the relevant legal standards were clear it is not unfair to say that the litigation was unnecessary. It achieved, however, substantial delay in the full desegregation of city schools. Courts are not meant to be the conventional means by which persons' rights are afforded. The law favors settlement and voluntary compliance with the law. When parties must institute litigation to secure what is plainly due them, it is not unfair to characterize a defendant's conduct as obstinate and unreasonable and as a perversion of the purpose of adjudication, which is to settle actual disputes.

It is not argument to the contrary that political realities may compel school administrators to insist on integration by judicial decree and that this is the ordinary, usual means of achieving compliance with constitutional desegregation standards. If such considerations lead parties to mount defenses without hope of success, the judicial process is nonetheless imposed upon and the plaintiffs are callously put to unreasonable and unnecessary expense.

As long ago as 1966 a court of appeals in another circuit uttered a strong suggestion that evasion and obstruction of desegregation should be discouraged by compelling state officials to bear the cost of relief:

> The Board is under an immediate and absolute constitutional duty to afford non-racially operated school programs, and it has been given judicial and executive guidelines for the performance of that duty. If well-known constitutional guarantees continue to be ignored or abridged and individual pupils are forced to resort

> to the courts for protection, the time is fast approaching when the additional sanction of substantial attorneys' fees should be seriously considered by the trial courts. Almost solely because of the obstinate, adamant, and open resistance to the law, the educational system of Little Rock has been embroiled in a decade of costly litigation, while constitutionally guaranteed and protected rights were collectively and individually violated. The time is coming to an end when recalcitrant state officials can force unwilling victims of illegal discrimination to bear the constant and crushing expense of enforcing their constitutionally accorded rights. *Clark* v. *Board of Education of Little Rock School District, supra,* 671.

That time has now expired. See also, *Cato* v. *Parham, supra.* Our Court of Appeals, too, has indicated a willingness to place litigation costs on defendants in recent cases; in *Nesbit* v. *Statesville City Board of Education, supra,* they took the unusual step of directing the district court to exercise its discretion in the matter in favor of the plaintiffs. This was also done six years before in *Bell* v. *County School Board of Powhatan County, supra,* when aggravated misconduct was shown; in *Nesbit,* by contrast, the defendants seem to have been guilty of delay alone.

Not only has the continued litigation herein been precipitated by the defendants' reluctance to accept clear legal direction, but other compelling circumstances make an equitable allowance necessary. This has been a long and complex set of hearings. Plaintiffs' counsel have demonstrated admirable expertise, discussed below, but from the beginning the resources of opposing parties have been dis-

proportionate. Ranged against the plaintiffs have been the legal staff of the City Attorney's office and retained counsel highly experienced in trial work. Additionally the School Board possessed the assistance of its entire administrative staff for investigation and analysis of information, preparation of evidence, and expert testimony of educators. Few litigants—even the wealthiest—come into court with resources at once so formidable and so suited to the litigation task at hand. Sums paid outside counsel alone far exceed the plaintiffs' estimate of the cost of their time and effort.

Moreover, this sort of case is an enterprise on which any private individual should shudder to embark. No substantial damage award is ever likely, and yet the costs of proving a case for injunctive relief are high. To secure counsel willing to undertake the job of trial, including the substantial duty of representing an entire class (something which must give pause to all attorneys, sensitive as is the profession to its ethical responsibilities) necessarily means that someone—plaintiff or lawyer—must make a great sacrifice unless equity intervenes. Coupled with the cost of proof is the likely personal and professional cost to counsel who work to vindicate minority rights in an atmosphere of resistance or outright hostility to their efforts. See *NAACP* v. *Button*, 371 U.S. 415, 435-36 (1963); *Sanders* v. *Russell*, 401 F. 2d 241 (5th Cir. 1968).

Still further, the Court must note that the defendants' delay and inaction constituted more than a cause for needless litigation. It inspired in a community conditioned to segregated schools a false hope that constitutional interpretations as enunciated by the courts pursuant to their responsibilities, as intended by the Constitution, could in

some manner, other than as contemplated by that very document, be influenced by the sentiment of a community.

The foregoing in no manner is intended to express a lack of personal compassion for the difficult and arduous task imposed upon the members of the defendant school board. Nevtherless they, and indeed the other defendants as well, had a public trust to encourage what may well be considered one of the most precious resources of a community; an attitude of prompt adherence to the law, regardless of the manifested erroneous view that mere opposition to constitutional requirements would in some manner result in a change in those requirements.

Power over public education carries with it the duty to provide that education in a constitutional manner, a duty in which the defendants failed.

These general factors were present, although in lesser magnitude, in the *Rolax* case in 1951, in which the Fourth Circuit said that an award of counsel fees would be fully justified.

Passing the question of the appropriateness of allowing fees on the basis of traditional equitable standards, the Court is persuaded that in 1970 and 1971 the character of school desegregation litigation has become such that full and appropriate relief must include the award of expenses of litigation. This is an alternative ground for today's ruling.

The circumstances which persuaded Congress to authorize the payment of attorney's fees by statute under certain sections of the 1964 Civil Rights Act, see 42 U.S.C. §§ 2000a-3(b), 2000e-5(k), very often are present in even greater degree in school desegregation litigation. In *Newman* v.

Piggie Park Enterprises, Inc., supra, the Supreme Court elucidated the logic underlying the 1964 legislation:

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. *Id.,* 401-02.

Newman was followed in *Miller* v. *Amusement Enterprises, Inc.,* 426 F. 2d 534 (5th Cir. 1970), in which the court recognized that in cases where the plaintiffs had undertaken no obligation to pay counsel, congressional purposes would best be served by directing payment to the lawyers.

The rationale of *Newman,* moreover, has equal force in employment discrimination cases, even where plaintiffs are only partially successful, where their lawsuit serves to bring an employer into compliance with the Act. *Lea* v. *Cone Mills Corp.,* No. 14,068, 438 F. 2d 80 (4th Cir. Jan. 29, 1971); *Parham* v. *Southwestern Bell Telephone Co.,* 433 F. 2d 421 (5th Cir. 1970).

School desegregation cases almost universally proceed as class actions. Use of this unconventional form of action

converts a private lawsuit into something like an administrative hearing on compliance of a crucial public facility with legal rules defining, in part, its mission. Such result has come about as the law developed so that it protects as a matter of individual right not just admission into formerly white schools of black applicants, but attendance in a nondiscriminatory school system. *Green* v. *County School Board of New Kent County, supra; Bradley* v. *School Board of City of Richmond,* 317 F. 2d 429 (4th Cir. 1963).

Manifestly, too, not only are the rights of many asserted in such suits, but also it has become a matter of vital governmental policy not just that such rights be protected, but that they be immediately vindicated in fact. See 42 U.S.C. § 2000e, et seq. Partly this national goal has been pursued by administrative proceedings, but a large part of the job has fallen to the courts, and for them it has been a task of unaccustomed extent and difficulty. "Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then." *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. 1, 13.

The private lawyer in such a case most accurately may be described as "a private attorney general." Whatever the conduct of defendants may have been, it is intolerably anomalous that counsel entrusted with guarantying the effectuation of a public policy of nondiscrimination as to a large proportion of citizens should be compelled to look to himself or to private individuals for the resources needed to make his proof. The fulfillment of constitutional guaranties, when to do so profoundly alters a key

social institution and causes reverberations of untraceable extent throughout the community, is not a private matter. Indeed it may be argued that it is a task which might better be undertaken in some framework other than the adversary system. Courts adapt, however; but in doing so they must recognize the new legal vehicles they create and ensure that justice is accomplished fully as effectively as under the old ones. The tools are available. Under the Civil Rights Act courts are required fully to remedy an established wrong, *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 232-34 (1964), and the payment of fees and expenses in class actions like this one is a necessary ingredient of such a remedy.

This rule is consistent with the Court's power and serves an evident public policy to encourage the just and efficient disposition of cases concerning school desegregation. Cf. 42 U.S.C. § 2000c-6. It serves no person's interest to decide these cases on the basis of a haphazard presentation of evidence, hampered by inadequate manpower for research into the bases of liability and the elements of relief. Where the interests of so many are at stake, justice demands that the plaintiffs' attorneys be equipped to inform the court of the consequences of available choices; this can only be done if the availability of funds for representation is not left to chance. In this unprecedented form of public proceeding, exercise of equity power requires the Court to allow counsel's fees and expenses, in a field in which Congress has authorized broad equitable remedies "unless special circumstances would render such an award unjust," *Newman* v. *Piggie Park Enterprises, Inc., supra*, 402. No such circumstances are present here.

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The amount of the allowance is not difficult to establish. Counsel have agreed to submit the matter of costs, fees and expenses to the Court on documentary evidence. The period of time to which this opinion relates runs from the March, 1970, motion for further relief until January 29, 1971. Findings of fact as to defendants' actions after that date have been made; these tend to establish their continuing pattern of inaction and resistance.

Trial counsel for the plaintiffs demonstrated throughout the litigation a grasp of the material facts and a command of the relevant law equaled by very few lawyers who have appeared before this Court. Needless to say their understanding of the field enabled them to be of substantial assistance to the Court, which is their duty. Local counsel did not examine witnesses, but assisted in pretrial preparation and also at hearings, as required by local rules. Some of the working hours included in counsel's estimates of time spent, moreover, include travel times. These are properly listed for two reasons. First, counsel can and do work while traveling. Second, other complex cases often require parties to enlist the aid of out-of-town counsel, for whose travel time they pay.

In conformity with practice in his home bar of Memphis, Tennessee, a lawyer for the plaintiffs secured three affidavits from disinterested brother counsel stating their estimate of the fair value of legal services rendered by plaintiffs' counsel. The affidavits state facts showing a current familiarity with prevailing fee rates and with, in two cases, the full case file. Considering the abilities of counsel, the time required, and the results achieved, these lawyers placed a value on the services very close to the estimates of the plaintiffs.

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The Virginia Supreme Court of Appeals long ago set forth the factors relevant to the value of an attorney's services:

> [c]ircumstances to be considered . . . are the amount and character of the services rendered, the responsibility imposed; the labor, time and trouble involved; the character and importance of the matter in which the services are rendered; the amount of money or the value of the property to be affected; the professional skill and experience called for; the character and standing in their profession of the attorneys; and whether or not the fee is absolute of contingent . . . The result secured by the services of the attorney may likewise be considered; but merely as bearing upon the consideration of the efficiency with which they were rendered, and in that way, upon their value on a quantum meruit, not from the standpoint of their value to the client. *Campbell County* v. *Howard*, 133 Va. 19, 112 S.E. 2d 876, 885 (1922).

In this case the marshalling of evidence on liability and especially on remedy were complex tasks. The responsibility was probably as great as ever falls upon a private lawyer. Time spent was considerable; the Court accepts the estimates of time and expenses dated January 6, 1970, as modified in a memorandum submitted on March 15, 1970. The subject of the litigation was of the utmost importance. The Court has already referred to the lawyers' performance, which they undertook without assurance of reasonable compensation. Substantial results, too, were secured by their efforts.

On the basis of these factors, plus the equitable considerations compelling an allowance, the Court has determined that a reasonable attorney's fee would be $43,355.00.[8]

Expense incurred, including taxable costs, have also been estimated by the plaintiffs. As in the case of attorney's fees, these cover the period from March of 1970 through January 29, 1971, and relief is not requested with reference to matters raised by the motion for joinder of further parties filed by the School Board. Costs and expenses as to those matters are therefore not under consideration.

Because the Court has decided that plaintiffs' counsel are due an allowance of the actual expenses of the litigation, it is not necessary to determine whether certain items of expense would in the usual case be taxable as costs under 28 U.S.C. § 1920; see 6 Moore's Federal Practice ¶ 54.70, et seq. (2d ed. 1966).

Many of the expenses incurred by plaintiffs' counsel are attributable to their traveling from New York and Memphis for preparation and trial, but, as the Court already said, the complexity of cases of this sort often, as here, justifies the use of counsel from outside the local bar. The difficulty of retaining local trial counsel must be especially great in litigation over minorities' civil rights; the unpopularity of the causes and the likelihood of small reward discourage many lawyers even from mastering the field of law, much less accepting the cases. Expenses for travel, hotel accommodations and restaurant meals are fairly allowable. The Court takes notice of the fact that

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[8] The Court has reduced the requested allowance pursuant to the supplemental memorandum filed by plaintiffs under date of Mar. 15, 1971, and in addition has deducted the item of $990 having to do with City Council's requested stay of Court's order of August 1970.

the absence of an attorney from the area of his office usually results in financial hardship in relation to the balance of his practice, and there ought not to be superimposed thereon additional living expenses.

Fees for expert witnesse' testimony likewise will be allowed as an expense of suit. It is difficult to imagine a more necessary item of proof (and source of assistance to the Court) than the considered opinion of an educational expert.

Investigation assistance and office supplies likewise are obviously proper; one must contrast the rather minimal expenses of the plaintiffs under this heading with the resources used by the defendants.

Transcript costs, including those for depositions which were taken with the Court's encouragement, and miscellaneous court fees are allowable.

The Court will not assess against the School Board, however, expenses occasioned by the stay applications unsuccessfully filed by the Richmond City Council. These may be considered on a separate application.

The Court computes the total allowable expenses to be $13,064.65. The total award, including counsel fees, comes to $56,419.65.[9] This is a large amount, but it falls well below the value of efforts made in defending the suit. Outside counsel for the School Board to date have submitted bills well in excess of the amounts awarded. [Portions of the submitted bills cover periods with which we are not here concerned.] In addition, as noted above, the defendants made use of the regular legal staff of the City

[9] Expenses incurred in reference to City Council's request for stay of August 1970 order are not included herein, nor are expenses allocated to filing of amended complaint.

Attorney and the School Board's administrative staff. For purposes of comparison, in a recent antitrust case tried by one Richmond attorney and two lawyers from outside the local bar, this Court awarded $117,000 in counsel fees. The amount in this case is not excessive.

For the reasons stated, an order shall enter this day decreeing the payment of the sum mentioned to counsel for the plaintiffs.

ROBERT R. MERHIGE
United States District Judge

Date: May 26, 1971

Contempt Motion by Plaintiffs

(Filed July 17, 1971)

Comes now the plaintiffs through their undersigned counsel and respectfully move the Court for an order that the defendant School Board of the City of Richmond and defendants, Mrs. W. Hamilton Crockford, III, Lewis T. Booker, Mrs. William C. Calloway, Richard I. Schwarzschild, Jr., Miles J. Jones, Linwood M. Woolridge, Jr., and William O. Edwards, are in contempt of this Court's order of May 26, 1971 directing the payment forthwith of $56,419.65 to counsel for plaintiffs.

Plaintiffs further move that until said order is obeyed, the individual defendants be imprisoned and/or fined as follows:

1. The defendant School Board a fine of $1,000 per day.

2. The individual defendants a fine of $500 per day to be paid from their personal assets and not from the taxes paid by plaintiffs.

Plaintiffs would respectfully suggest that if any individual defendant appears and shows to the Court that he, as an individual board member, is willing to obey the order of the Court, that he then be exempt from a finding of or penalty for contempt.

Contempt Motion by Plaintiffs

Plaintiffs will further show the Court that the defendant board has received from the defendant City Council the necessary funds to pay the award of this Court. The defendant board has willfully failed to obey the order of this Court.

/s/ JAMES R. OLPHIN
Of Counsel for Plaintiffs

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
10 Columbus Circle
New York, New York 10019

LOUIS R. LUCAS
525 Commerce Title Building
Memphis, Tennessee 38103

JAMES R. OLPHIN
214 East Clay Street
Richmond, Virginia 23219

M. RALPH PAGE
420 North First Street
Richmond, Virginia 23219

Counsel for Plaintiffs

Notice of Appeal

(Filed June 18, 1971)

Notice is hereby given that The School Board of the City of Richmond, Virginia, defendant in this action, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the order entered in this action on the 26th day of May, 1971.

THE SCHOOL BOARD OF THE CITY
OF RICHMOND, VIRGINIA

Excerpts from Transcript of Proceedings of June 21, 1971

[36] Now I must say, Mr. Little, that your suggestion that these proceedings are absurd, I think is well taken, but I don't think it is for the reason you stated. I think it is absurd that the plaintiffs still have to take this type of action.

I do not believe that the individual members of this school board, or the school board as a body, intended any disrespect to the Court or the Court's order.

If I had any doubt about that I would be dutybound to take appropriate action, but I have no doubt about that. I do not think the matter has been handled equitably or within the principles of law.

Now, these type of orders fall within that very special class that the law contemplates will happen, which determines rights that are collateral to the principal rights [37] that are being considered.

The law provides that, or recognizes, that they are too important to be denied review expeditiously independent of the ultimate.

So important that you can take an appeal that is not of a final ultimate judgment as you do in most cases. You can appeal this order.

It is considered important enough so that you don't have to wait until the whole cause is adjudicated.

It does disturb me at this particular time of the year, and I did encourage an appeal while we were discussing the compromise of these figures. I intimated at that time my feelings on the propriety of fees. I encouraged a compromise. You all couldn't get together, and that is all right because I take no offense at that. People have different views as to matters.

Excerpts from Transcript of Proceedings of June 21, 1971

I said at that time that I would do anything, in effect, to help with an appeal. But I said it under the theory that you could expedite it and you could have expedited it. I believe the Fourth Circuit would have taken quick action on it.

If I thought for one moment that this was a delay in doing anything, was an occasion for strategical purposes to put the plaintiffs' counsel to even a greater [38] burden than they have already been put to, I would take a different view.

I do not hold the board, or the members of the board in contempt. I do not find them to be in contempt.

I don't think equity has been done. I think they could have perfected their right of appeal and still done equity. They could have paid the money.

If successful in appeal they would have gotten it back. I have no doubt that officers of this court were good for it, would have taken it back, would have taken the burden. They didn't choose to do that, and that is all right. That is up to them.

But what has it done? It is obvious right here. We have a vote of four to three, or whatever it was. It puts people of one race voting one way and people of another voting another, the very thing that this whole litigation is about, to get rid of that. Equity was not done by the school board.

Order and Memorandum

(Filed June 22, 1971)

For the reasons stated in the memorandum of the Court this day filed, and deeming it proper so to do, it is ADJUDGED and ORDERED that:

1. The motion for a stay filed by the defendant School Board of the City of Richmond, be, and it is hereby, denied.

2. The order of this Court of May 26, 1971, remains in full force and effect, the Court having received the assurances satisfactory to it referred to in its memorandum.

3. The defendant School Board of the City of Richmond is directed to report to this Court in writing on or before 9:00 o'clock a.m., Wednesday, June 23, 1971, whether they are in compliance with the Court's order of May 26, 1971.

The United States Marshal is directed to serve, forthwith, copies of the memorandum and order on each member of the School Board of the City of Richmond, Virginia.

Let the Clerk send a copy of the memorandum and this order to all counsel of record.

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

June 22, 1971.

* * *

MEMORANDUM

This matter came on to be heard on June 21, 1971, on the plaintiffs' motion that individual members of the de-

fendant School Board be held in contempt of court for the failure of the School Board to comply with the Court's order of May 26, 1971, directing the payment of certain counsel fees. In addition to the foregoing motion there was argued before the Court the defendant School Board's motion for a stay of the Court's order of May 26, 1971, pending appeal by the defendant School Board.

For the reasons stated from the bench, the Court denied the plaintiffs' motion to hold the individual members of the School Board in contempt, and in addition the Court denied the defendants' motion for a stay. The reasons for the Court's ruling were amply enumerated in its oral rulings.

Briefly stated, the equitable considerations which prompted the Court to enter its order of May 26, 1971, requiring forthwith compliance by the said defendants of that order, likewise require, by reason of the unnecessary and unreasonable delay on the part of the defendants in filing their appeal and motion for stay, that the Court refuse said motion for a stay unless, as suggested by the defendant School Board at the bar of the Court, they are entitled to same by the posting of a supersedeas bond in an amount approved by the Court and as contemplated by Rule 62(d) of the Federal Rules of Civil Procedure.

Counsel for the defendants had requested that the Court withhold any further action until 11:00 a.m. this day, in order to supply the Court with authorities in support of their position. In the interim period, and consistent with what the Court had suggested from the bench, the defendant School Board through its counsel has now represented its willingness to forthwith pay the sums ordered by the Court on May 26, 1971, provided that the School Board is protected from any unnecessary delay in recovering such sums paid if its appeal is successful, and provided further

that payment is without prejudice to its position on appeal.

The Court is of the opinion that equity would be served by reducing the heavy financial burden upon counsel for the plaintiffs if such payment were made in such manner as would protect the defendant School Board from any unnecessary delay in recovering said sums paid should their appeal be successful.

Accordingly, having concluded that assurances from the N.A.A.C.P. Legal Defense and Education Fund, Inc., that it would in the event of a reversal by the Court of Appeals of this Court's order of May 26, 1971, forthwith deposit with this Court for transmittal to the defendant School Board such sums as the defendant School Board now pays to counsel for the plaintiffs pursuant to the Court's order heretofore mentioned, would fully protect the said School Board in the premises, an order will be entered directing that the said defendants, if advised by this Court that appropriate assurances as heretofore mentioned have been made, report to this Court in writing by no later than 9:00 a.m., Wednesday, June 23, 1971, to the effect that they have complied with this Court's order of May 26, 1971; or, in the event no such assurances as heretofore mentioned are forthcoming, an order will be entered granting the requested stay. Equity would require, as the Court has already stated from the bench, that the defendants be reasonably indemnified in the event of a successful appeal.

An order consistent with this memorandum will be entered.

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

June 22, 1971

School Board Motion to Amend Pleadings

(Filed August 26, 1971)

SCHOOL BOARD MOTION TO AMEND PLEADINGS TO CONFORM TO THE EVIDENCE (AMENDED CROSS-CLAIM)

Filed on August 26, 1971

Defendant, School Board of the City of Richmond, moves the Court for leave to amend its Answer to the Amended Complaint and Cross-Claim herein to conform to the evidence heretofore introduced at the trial of this cause over or without objection, as follows:

* * *

II. AMENDED CROSS-CLAIM

1. Defendant School Board adopts and realleges paragraph 1 of its Cross-Claim filed in this Court on January 15, 1971, as paragraph 1 of this Amended Cross-Claim, with the same force and effect as though it were set out in its entirety herein.

2. All children attending the Richmond Public Schools have a constitutional right under the Equal Protection Clause of the 14th Amendment to equality of educational

opportunity and to be free from all vestiges of the inequality inherent in a state-mandated system of dual schools.

3. The individual members of the School Board of the City of Richmond are bound by oath to support the United States Constitution which requires that they insure that all children in the Richmond public schools are afforded the equal protection of laws.

4. There is a mutuality and identity of interest between the School Board of the City of Richmond and all children attending the Richmond public schools which requires the School Board to assert claims in behalf of all such children in fulfillment of its duty to insure the protection of their constitutional rights.

5. The School Board of the City of Richmond has an affirmative duty to insure the fulfillment and protection of the constitutional rights of the pupils within its system by coming forth with a plan for the desegregation of its schools which promises realistically to afford the complete and effective relief required.

6. The current plan of desegregation for the Richmond school system, in the light of available alternatives, is constitutionally defective in that it serves merely to facilitate predictable resegregation encouraged by the maintenance of the present arrangement of school divisions and artificial boundary lines in the Richmond community which process reinforces the state-imposed dual school system in the Richmond metropolitan area and is producing a dual school system in this area and inherent inequality and lack of equal educational opportunity within the Richmond system alone.

7. Fulfillment on the part of the Richmond School Board of its obligation to insure the protection of the constitutional rights of the children within its system has been rendered impossible owing to the maintenance of the present alignment of school divisions and the non-educationally related artificial boundaries produced thereby which encourages and facilitates resegregation within the Richmond system alone.

8. The current plan for the desegregation of the Richmond Public Schools must be assessed in terms of whether it realistically promises to afford Richmond school children their constitutional right to equal educational opportunity and quality education; such an assessment must be made in terms of the circumstances present and the options available.

9. The present alignment of school divisions in the Richmond community has been mandated and sustained by the defendant State Board of Education for many years, and was redetermined and is currently maintained by said defendant by virtue of a directive issued as recently as July 1, 1971.

10. The defendants State Board of Education and Superintendent of Public Instruction have an affirmative constitutional duty to take all steps required to effectively dismantle the state-mandated system of dual schools to the end that all children attending the Richmond public schools may enjoy their constitutional right to an equal educational opportunity.

11. Under the present alignment of school divisions in this community as mandated by the defendant State Board of Education, the school children of the City of Richmond

are being denied their constitutional right to an equal educational opportunity owing to the maintenance by said defendant of non-educationally related artificial boundaries which facilitate resegregation within the Richmond system alone.

12. For many years the defendant state school authorities ignored and disregarded the existence of political subdivision lines in order to perpetuate a state-wide system of unconstitutionally discriminatory dual schools.

13. Under the laws enacted pursuant to the 1902 Constitution of Virginia, as amended, the defendant State Board of Education had the power to order that any single school division be comprised of multiple political subdivisions such as the City of Richmond and the Counties of Henrico and Chesterfield thus fulfilling its constitutional obligation to afford the right to an equal educational opportunity to all children attending the Richmond public schools; under the laws enacted pursuant to the 1971 revision of the Constitution of Virginia, the defendant State Board of Education, with the consent of the defendant governing bodies and school boards of the Counties of Henrico and Chesterfield and those of the City of Richmond, can order the consolidation of the three area school divisions thus fulfilling its constitutional duty in the manner set forth above; furthermore, full enjoyment of the constitutional rights of the children attending the Richmond public schools cannot be conditioned upon any provision requiring the consent of state agencies.

14. The adherence to the political subdivision boundaries of Richmond, Henrico and Chesterfield results in the denial of equal protection of the laws and the failure to af-

ford full and complete relief to the children attending the public schools of Richmond.

15. The continued maintenance by the defendant State Board of Education of the present arrangement of school divisions in this area and the non-educationally related artificial boundaries produced thereby constitutes a direct violation of the constitutional rights of all the children in the Richmond public schools to equality of educational opportunity and to be free from all vestiges of a state enforced dual system of schools productive of inherently unequal facilities.

16. The continued maintenance by the defendant State Board of Education of the present arrangement of school divisions in this area and the non-educationally related artificial boundaries produced thereby has effectively precluded the School Board of the City of Richmond from fulfilling its affirmative duty to protect the constitutional rights of the children within its system thus necessitating this claim for relief by the Richmond School Board in behalf of its school children.

WHEREFORE, defendant School Board of the City of Richmond respectfully prays that this Court enter its Order requiring defendant State Board of Education, either pursuant to or independent of provisions of state law, to consolidate the public school systems of the City of Richmond and the Counties of Henrico and Chesterfield to form one combined school division; to bear the ultimate responsibility for the preparation of a unitary plan for the operation of all public schools within the new combined system in accordance with the specific guidelines established by this Court; to utilize its power to require the respective gov-

ernmental subdivisions to provide adequate funds for the operation of the combined system; and to supervise pursuant to the directions of this Court all material aspects of the operation of said system.

THE SCHOOL BOARD OF THE CITY OF RICHMOND, VIRGINIA

/s/ GEORGE B. LITTLE
Of Counsel

GEORGE B. LITTLE
Browder, Russell, Little and Morris
1510 Ross Building
Richmond, Virginia 23219

CONARD B. MATTOX, JR.
City Attorney
402 City Hall
Richmond, Virginia 23219

Opinion of the United States Court of Appeals

(Filed November 29, 1972)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 71-1774

CAROLYN BRADLEY, etc., *et al.*,

Appellees,

—versus—

THE SCHOOL BOARD OF
THE CITY OF RICHMOND, VIRGINIA, *et al.*,

Appellant.

Section III of the opinion, dealing with the application of Section 718 to the proceedings, heard October 2, 1972,

Before HAYNSWORTH, Chief Judge, WINTER, CRAVEN, RUSSELL and FIELD, Circuit Judges (Butzner, Circuit Judge, being disqualified) sitting en banc;

Other parts of the cause heard March 7, 1972,

Before WINTER, CRAVEN and RUSSELL, Circuit Judges.

Decided November 29, 1972.

RUSSELL, Circuit Judge:

This appeal challenges an award of attorney's fees made to counsel for plaintiffs in the school desegregation suit filed against the School Board of the City of Richmond, Virginia. Though the action has been pending for a num-

ber of years,[1] the award covers services only for a period from March, 1970, to January 29, 1971. It is predicated on two grounds: (1) that the actions taken and defenses entered by the defendant School Board during such period represented unreasonable and obdurate refusal to implement clear constitutional standards; and (2) apart from any consideration of obduracy on the part of the defendant School Board since 1970, it is appropriate in school desegregation cases, for policy reasons, to allow counsel for the private parties attorneys' fees as an item of costs. The defendant School Board contends that neither ground sustains the award. We agree.

We shall consider the two grounds separately.

I.

This Court has repeatedly declared that only in "the extraordinary case" where it has been " 'found that the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy' or persistent defiance of law", would a court, in the exercise of its equitable powers, award attorney's fees in school desegregation cases. *Brewer* v. *School Board of City of Norfolk, Virginia* (4th Cir. 1972), 456 F.2d 943, 949. Whether the conduct of the School Board constitutes "obdurate obstinacy" in a particular case is ordinarily committed to the discretion of the District Judge, to be disturbed only "in the face of compelling circumstances", *Bradley* v. *School Board of City of Richmond, Virginia* (4th Cir. 1965), 345 F.2d 310, 321. A finding of obduracy

[1] See Note 1 in majority opinion of *Bradley* v. *The School Board of the City of Richmond, Virginia*, decided June 5, 1972, for history of this litigation.

by the District Court, like any other finding of fact made by it, should be reversed, however, if "the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *Gypsum Co.* (1948), 333 U. S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746; Wright-Miller, *Federal Practice and Procedure*, Vol. 9, p. 731 (1971). We are convinced that the finding by the District Court of "obdurate obstinacy" on the part of the defendant School Board in this case was error.

Fundamental to the District Court's finding of obduracy is its conclusion that the litigation, during the period for which an allowance was made, was unnecessary and only required because of the unreasonable refusal of the defendant School Board to accept in good faith the clear standards already established for developing a plan for a non-racial unitary school system. This follows from the pointed statements of the Court in the opinion under review that, "Because the relevant legal standards were clear it is not unfair to say that the litigation (in this period) was unnecessary", and that, "When parties must institute litigation to secure what is plainly due them, it is not unfair to characterize a defendant's conduct as obstinate and unreasonable and as a perversion of the purpose of adjudication, which is to settle actual disputes." [2] At another point in its opinion, the Court uses similar language, declaring that "the continued litigation herein (has) been precipitated by the defendants' reluctance to accept clear legal direction, * * *." [3] It would appear,

[2] See, 53 FRD at p. 39.

[3] 53 FRD at p. 40.

however, that these criticisms of the conduct of the Board, upon which, to such a large extent, the Court's award rests, represent exercises in hindsight rather than appraisal of the Board's action in the light of the law as it then appeared.[4] The District Court itself recognized that, during this very period when it later found the Board to have been unreasonably dilatory, there was considerable uncertainty with reference to the Board's obligation, so much so that the Court had held in denying plaintiffs' request for mid-school year relief in the fall of 1970, that "it would not be reasonable to require further steps to desegregate * * *," giving as its reason: "Because of the nearly universal silence at appellate levels, which the Court interpreted as reflecting its own hope that authoritative Supreme Court rulings concerning the desegregation of schools in major metropolitan systems might bear on the extent of the defendants' duty."[5] In fact, in July, 1970, the Court was writing to counsel that, "In spite of the guidelines afforded by our Circuit Court of Appeals and the United States Supreme Court, there are still many practical problems left open, as heretofore stated, including to what extent school districts and zones may or must be altered as a constitutional matter. A study of the cases shows almost limitless facets of study engaged in by the various school authorities throughout the country in attempting to achieve the necessary results."[6] The District

[4] See *Monroe* v. *Board of Com'rs. of City of Jackson, Tenn.* (6th Cir. 1972), 453 F.2d 259, 263:

"In determining whether this Board's conduct was, as found by the District Court, unduly obstinate, we must consider the state of the law as it then existed."

[5] 53 FRD at p. 33.

[6] See, Joint Appendix 74-75.

Court had, also, earlier defended the School Board's request of a stay of an order entered in the proceedings on August 17, 1970, stating: "Their original (the School Board's) requests to the Fourth Circuit that the matter lie in abeyance were undoubtedly based on valid and compelling reasons, and ones which the Court has no doubt were at the time both appropriate and wise, since defendants understandably anticipated a further ruling by the United States Supreme Court in pending cases; * * *."[7] Earlier in 1970, too, the Court had taken note of the legal obscurity surrounding what at that time was perhaps the critical issue in the proceeding, centering on the extent of the Board's obligation to implement desegregation with transportation. Quoting from the language of Chief Justice Burger in his concurring opinion in *Norcross* v. *Board of Education of Memphis, Tenn. City Schools* (1970), 397 U. S. 232, 237, 90 S. Ct. 891, 25 L. Ed. 2d 426, the District Court observed that there are still practical problems to be determined, not the least of which is "to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court."[8] In fact, the District Court had during this very period voiced its own perplexity, despairingly commenting that "no real hope for the dismantling of dual school systems (in the Richmond School system) appears to be in the offing unless and until there is a dismantling of the all Black residential areas."[9] At this time, too, as the District Court pointed out, there was some difficulty in applying even the term

[7] 325 F. Supp. at p. 832.

[8] 317 F. Supp. at p. 575.

[9] 317 F. Supp. at p. 566.

"unitary school system".[10] In summary, it was manifest in 1970, as the District Court had repeatedly stated, that, while *Brown* and other cases had made plain that segregated schools were invalid, and that it was the duty of the School Board to establish a non-racial unitary system, the practical problems involved and the precise standards for establishing such a unitary system, especially for an urbanized school system—which incidentally were the very issues involved in the 1970 proceedings—had been neither resolved nor settled during 1970; in fact, the procedures are still matters of lively controversy.[11] It would seem, therefore, manifest that, contrary to the premise on which the District Court proceeded in its opinion, the legal standards to be followed by the Richmond School Board in working out an acceptable plan of desegregation for its system were not clear and plain at any time in 1970 or even 1971.

It is true, as the District Court indicates, that the Supreme Court in 1968 had, in *Green* v. *County School Board* (1968), 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716, found "freedom-of-choice" plans that were not effective unacceptable instruments of desegregation, and that the defendant Board, following that decision, had taken no affirmative steps on its own to vacate the earlier Court-approved

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[10] That this term "unitary" is imprecise, the District Court stated in 325 F. Supp. at p. 844:

> "The law establishing what is and what is not a unitary school system lacks the precision which men like to think imbues other fields of law; perhaps much of the public reluctance to accept desegregation rulings is attributable to this indefiniteness."

[11] *Bradley* v. *The School Board of the City of Richmond, Virginia*, decided June 5, 1972, *supra*.

"freedom-of-choice" plan for the Richmond School system, or to submit a new plan to replace it. In *Green*, the Court had held that, "if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable." [12] In suggesting zoning, *Green* offered a ready and easily applied alternative to "freedom-of-choice" for a thinly populated, rural school district such as Old Kent, but other than denying generally legitimacy to freedom-of-choice plans, *Green* set forth few, if any, standards or benchmarks for fashioning a unitary system in an urbanized school district, with a majority black student constituency, such as the Richmond school system. In fact, a commentator has observed that *"Green* raises more questions than it answers".[13] Perhaps the School Board, despite the obvious difficulties, should have acted promptly after the *Green* decision to prepare a new plan for submission to the Court. Because of the vexing uncertainties that confronted the School Board in framing a new plan of desegregation, problems which, incidentally, the District Court itself finally concluded could only be solved by the drastic and novel remedy of merging independent school districts,[14] and pressed with no local complaints from plaintiffs or others, it was natural that the School Board would delay. Mere inaction under such circumstances, however, and in the face of the "practical difficulties" as reflected in the

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[12] 391 U.S. at p. 441.

[13] 82 *Har. L. Rev.* 116.

[14] A measure found inappropriate by this Court in *Bradley* v. *The School Board of the City of Richmond, Virginia*, decided June 5, 1972, *supra*.

later litigation, cannot be fairly characterized as obdurateness. Indeed the plaintiffs themselves were in some apparent doubt as to how they wished to proceed in the period immediately after *Green* and took no action until March, 1970. Even then they offered no real plan, contenting themselves with demanding that the School Board formulate a unitary plan, and with requesting an award of attorney's fees. It is unnecessary to pursue this matter, however, since the District Court does not seem to have based its award upon the inaction of the School Board prior to March 10, 1970, but predicated its award on the subsequent conduct of the School Board.

The proceedings, to which this award applies, began with the filing by the plaintiffs of their motion of March 10, 1970, in which they asked the District Court to "require the defendant school board forthwith to put into effect a method of assigning children to public schools and to take other appropriate steps which will promptly and realistically convert the public schools of the City of Richmond into a unitary non-racial system from which all vestiges of racial segregation will have been removed; and that the Court award a reasonable fee to their counsel to be assessed as costs." With the filing of this motion, the Court ordered the defendant School Board to "advise the Court if it is their position that the public schools of the City of Richmond, Virginia are being operated in accordance with the constitutional requirements to operate unitary schools as enunciated by the United States Supreme Court." It added that, should the defendant School Board not contend that its present operations were in compliance, it should "advise the Court the amount of time" needed "to submit a plan." Promptly, within less than a week after the Court issued

this order, the School Board reported to the Court that (1) it had been advised that it was not operating "unitary schools in accordance with the most recent enunciations of the Supreme Court of the United States" and (2) it had requested HEW, and HEW had agreed, to make a study and recommendations that would "ensure" that the operation of the Richmond Schools was in compliance with the decisions of the Supreme Court. This HEW plan was to be made available "on or about May 1, 1970" and the Board committed itself to submit a proposed plan "not later than May 11, 1970". A few days later, the District Court held a pre-trial hearing and specifically inquired of the School Board as to the necessity for "an evidentiary hearing" on the legality of the plan under which the schools were then operating. The defendant School Board candidly advised the Court that, so far as it was concerned, no hearing was required since it "admitted that their (its) freedom-of-choice plan, although operating in accord with this Court's order of March 30, 1966, was operating in a manner contrary to constitutional requirements." [15] The District Court characterizes this concession by the School Board as "reluctantly" given, and its finding of reluctance at this early stage in the proceeding is an element in the District Court's conclusion that the School Board has been obdurate. The record, however, provides no basis for this characterization of the conduct of the School Board. The School Board had manifested no reluctance to concede that its existing plan of operation did not comply with *Green*. When called on by the Court for a response to plaintiffs' motion, it had acted with becoming dispatch to enlist the assistance of that agency of Government supposed to have expertise in the

[15] 338 F. Supp. 71.

area of school desegregation and charged by law with the duty of assisting school districts with such problems. Every action of the School Board at this stage could be said to be reasonably calculated to facilitate the progress of the proceedings and to lighten the burdens of the Court. This conclusion is supported by the fact that what the Board did was apparently found acceptable and helpful by both the Court and the plaintiffs. Neither contended that the proposed time-table was dilatory or that the use of HEW was an inappropriate agency to prepare an acceptable plan. As a matter of fact, the utilization of the services of HEW under these circumstances was an approved procedure at the time, one recommended by courts repeatedly to school districts confronted with the same problem as the Richmond schools.[16]

On May 4, 1970, HEW submitted to the School Board its desegregation plan, prepared, to quote HEW, in response to the Board's own "expressed desire to achieve the goal of a unitary system of public schools and in accordance with our interpretation of action which will most

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[16] *Green* v. *School Board of City of Roanoke, Virginia* (4th Cir. 1970), 428 F.2d 811, 812; *Monroe* v. *County Bd. of Education of Madison Co., Tenn.* (6th Cir. 1971), 439 F.2d 804, 806; Note, The Courts, HEW and Southern School Desegregation, 77 Yale L. J. 321 (1967).

During oral argument, counsel for the plaintiffs contended that HEW had in recent months become a retarding factor in school desegregation actions, citing *Norcross* v. *Board of Education of Memphis*, Civ. No. 3931 (W.D. Tenn., Jan. 12, 1972), —— F. Supp. ——, ——. Without passing on the justice of the criticism, it must be borne in mind this was not the view in 1970, as is evident in the decisions cited. This argument emphasizes again, it may be noted, the erroneous idea that the reasonableness of the Board's conduct in 1970 is to be tested, not by circumstances as they were understood then, but in the light of 1972 circumstances.

soundly achieve this objective." In formulating its plan, HEW received no instructions from the School Board, "Except to try our best to meet the directive of the Court Order and they gave me the Court Order." There were no meetings of the School Board and HEW "until the plan had been developed in almost final form." Manifestly, the Board acted throughout the period when HEW was preparing its plan, in utmost good faith, enjoining HEW "to meet the directive" of the Court and relying on that specialized agency to prepare an acceptable plan. The Board approved, with a slight, inconsequential modification, the plan as prepared by HEW and submitted it to the Court on May 11, 1970. The District Court faults the Board for submitting this plan, declaring that the plan "failed to pass legal muster because those who prepared it were limited in their efforts further to desegregate by self-imposed restrictions on available techniques" [17] and emphasizing that its unacceptability "should have been patently obvious in view of the opinion of the United States Court of Appeals for the Fourth Circuit in *Swann* v. *Charlotte-Mecklenburg Board of Education* 431 F.2d (138), (4th Cir. 1970), which had been rendered on May 26, 1970." [18] The failure to use "available techniques" such as "busing and satellite zonings" and whatever "self-imposed limitations" may have been placed on the planners were not the fault of the School Board but of HEW, to whom the School Board, with the seeming approval of the Court and the plaintiffs, had committed without any restraining instructions the task of preparing an acceptable plan. Moreover, at the time the

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[17] See, 53 F.R.D. at p. 31.

[18] See, 338 F. Supp. at p. 71.

plan was submitted to the Court by the School Board, *Swann* had not been decided by this Court. And when the Court disapproved the HEW plan, the Board proceeded in good faith to prepare on its own a new plan that was intended to comply with the objectives stated by the Court.

The Court did find some fault with the Board because, "Although the School Board had stated, as noted, that the free choice system failed to comply with the Constitution, producing as it did segregated schools, they declined to admit during the June (1970) hearings that this segregation was attributable to the force of law (transcript, hearing of June 20, 1970, at 322)" and that as a result, "the plaintiffs were put to the time and expense of demonstrating that governmental action lay behind the segregated school attendance prevailing in Richmond." [19] This claim of obstruction on the part of the Board is based on the latter's refusal to concede, in reply to the Court's inquiry, "that free choice did not work because it was *de facto* segregation".[20] It is somewhat difficult to discern the importance of determining whether the "free choice" plan represented "*de facto* segregation" or not: It was candidly conceded by the School Board that "free choice", as applied to the Richmond schools, was impermissible constitutionally, and this concession was made whether the unacceptability was due to "*de facto*" segregation or not.[21] In a school system such as that of Richmond, where there had been formerly *de jure* segregation, *Green* imposed on the School Board the "duty to eliminate racially identifiable

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[19] See, 53 FRD at p. 30.

[20] See Joint Appendix 47, Tr. p. 322.

[21] See 345 F.2d 322.

schools even where their preservation results from educationally sound pupil assignment policies." [22] The School Board's duty was to eliminate, as far as feasible, "racially identifiable schools" in its systems.[23] The real difficulty with achieving this result was that, whatever may have been the reasons for its demographic and residential patterns,[24]

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[22] 82 *Har. L. Rev.* 113; cf., *Ellis* v. *Board of Public Instruction of Orange Co., Fla.* (5th Cir. 1970), 423 F.2d 203, 204.

[23] The very term "racially identifiable" has received no standard definition. In *Beckett* v. *School Board of City of Norfolk* (D.C. Va. 1969), 308 F. Supp. 1274, 1291, rev. on other grounds, 434 F.2d 408, the Court found that a school in which the representation of the minority group was 10 per cent or better was not "racially identifiable". Dr. Pettigrew, the expert witness on whom the District Court in this proceeding relied heavily and who testified in *Beckett*, used 20 per cent in determining "racially identifiable" school population. See 308 F. Supp. 1291. The recent case of *Yarbrough* v. *Hulbert-West Memphis School Dist. No. 4* (8th Cir. 1972), 457 F.2d 333, 334, apparently would define as "racially identifiable" any school where the minority, whether white or black, was less than 30 per cent. The District Court in this proceeding would, in its application of the term "racially identifiable", construe the term as embracing the idea of a "viable racial mix" in the school population, which will not lead to a desegregation of the system. 338 F. Supp. at pp. 194-5. Actually, as Dr. Pettigrew indicated, it would seem the term "racially identifiable" has no fixed definition and, its application, will vary with the circumstances of the particular situation, just as a plan of desegregation itself will vary, since, as the Court said in *Green, supra*, at p. 439, "There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case."

[24] That school policy is generally a minimal factor in such situation, see 85 *Har. L. Rev.* 77. In fact, the use of zoning and restrictive covenants as instruments of segregation is far more typical of northern than southern communities. See, McCloskey, *The Modern Supreme Court* (Har., 1972), pp. 109-10:

> "In fact, the maintenance of 'black ghettos' in the cities was north's substitute for the segregation laws of the south * * *.

there was, as the Court later reluctantly recognized, no practical way to achieve a racially balanced mix, whatever plan of desegregation was adopted. With a school population approximately 65 per cent black, it was not possible to avoid having schools that would be heavily black.[25] The constitutional obligation thus could, in that setting, only have as its goal the one stated by the District Court, i.e., "to the extent feasible within the City of Richmond."[26] Indeed, it was the very intractability of the problem of achieving a "viable racial mix" that prompted the Court to suggest in July, 1970, that it might be appropriate for the defendant School Board to discuss with the school officials of the contiguous counties the feasibility of consolidation of the school districts, "all of which may tend to assist them in their obligation".[27]

The Court's finding of obstruction particularly centers on the substitute plan which the School Board proposed on July 23, 1970, in accordance with the Court's previous directive. It found two objections to the plan. The objections are actually part of one problem, i.e., transportation. The first objection was that the plan did not require as much integration in the elementary grades as in the higher grades. Such a difference in treatment, however,

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The President's Committee on Civil Rights reported in 1947 that the amount of land covered by racial restriction in Chicago was as high as 80 per cent and that, according to students of the subject, virtually all new subdivisions are blanketed by these covenants."

[25] Cf., *United States* v. *Choctaw County Board of Education* (D.C. Ala. 1971), 339 F. Supp. 901, 903.

[26] See 325 F. Supp. 835.

[27] See Joint Appendix 74.

the Court found had some support in both *Swann*[28] and *Brewer*.[29] An increase in the desegregation of the elementary grades, however, depended upon the purchase and use of a considerable amount of transportation equipment by the board; and this was the basis of the second criticism that "the School Board had in August (1970) still taken no steps to acquire the necessary equipment."[30] The Court repeated this criticism with reference to the plaintiffs' mid-term motion made in the fall of 1970 for an amendment of defendant's approved interim plan which, for implementation, "required the purchase of transportation facilities which the School Board still would only say it would acquire if so ordered."[31] Yet at the very time when the action of the School Board in failing to buy buses was thus being found to be "unreasonably obdurate", the Court itself was declaring on August 7, 1970, that "it seems to me it would be completely unreasonable to force a school system that has no transportation, and you all don't have any to any great extent, to go out and buy new busses when the United States Supreme Court may say that is wrong."[32] Again, as late as January 29, 1971, the Court, in refusing to order the immediate implementation

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[28] 431 F.2d 138.

[29] In 324 F. Supp. 468, the Court said:

> "Language and holdings in both *Swann* and *Brewer* v. *School Board of City of Norfolk*, 434 F.2d 408 (4th Cir. June 22, 1970), indicate that a school board's duty to desegregate at the secondary level is somewhat more categorical than at the elementary level."

[30] 53 FRD 32.

[31] 53 FRD 32-3.

[32] Joint Appendix 92-3.

of a plan submitted by the plaintiffs, which "would require the acquisition of additional transportation facilities not then available", found that "the possibility that forthcoming rulings (by the Supreme Court)" might make such acquisition unnecessary and a needless expense induced "the Court to decide that immediate reorganization of the Richmond system would be 'unreasonable" under *Swann*." [33] If the Court did not feel it was reasonable in January, 1971, to require the Board to purchase additional buses, it certainly cannot be said that, in the period of uncertainty in 1970, the failure of the School Board to propose such acquisition, justifies any charge of unreasonableness, much less obdurateness or action "in defiance of law" or taken in "bad faith".

The conclusion of the District Court that the Board was "unreasonably obdurate", it seems, was influenced by the feeling, repeated in a number of the Court's opinions, that "Each move (by the Board) in the agonizingly slow process of desegregation has been taken unwillingly and under coercion".[34] The record, as we read it, though, does not indicate that the Board was always halting, certainly not obstructive, in its efforts to discharge its legal duty to desegregate; nor does it seem that the Court itself had always so construed the action of the Board. In June, 1970, the Court remarked, that, while not satisfied "that every reasonable effort has been made to explore" all possible means of improving its plan, it was "satisfied Dr. Little and Mr. Adams (the school administrators) have been working day and night diligently to do the best they

[33] See, Joint Appendix 132, 134, 135.

[34] 338 F. Supp. 103; see, also, 53 FRD 39.

could, the School Board too." [35] It may be that in the early years after *Brown* the School Board was neglectful of its responsibility, but, beginning in the middle of 1965, it seems to have become more active. Moreover, the promptness and vigor with which the Board adopted and pressed the suggestion of the Court that steps be considered in connection with a possible consolidation of the Richmond schools with those of Chesterfield and Henrico Counties must cast doubt upon any finding that the Board was unwilling to explore any avenue, even one of uncharted legality, in the discharge of its obligation. The Court wrote its letter suggesting a discussion with the other counties looking to such possible consolidation on July 6, 1970. The letter was addressed to the attorneys for the plaintiffs but a copy went to counsel for the School Board. Nothing was done by counsel for the plaintiffs as a result of this letter but on July 23, 1970, the Board moved the Court for leave to make the School Boards of Chesterfield and Henrico Counties parties and to serve on them a third-party complaint wherein consolidation of their school systems with that of the Richmond systems would be required. The Board thereafter took the "laboring oar" in that proceeding. Neither it nor its counsel has been halting in pressing that action, despite substantial local disapproval.[36]

It is clear that the Board, in attempting to develop a unitary school system for Richmond during 1970, was not operating in an area where the practical methods to be used were plainly illuminated or where prior decisions had not left a "lingering doubt" as to the proper pro-

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[35] See, Joint Appendix 92.

[36] See, 338 F. Supp. 67, 100-1.

cedure to be followed.[37] Even the District Court had its uncertainties. All parties were awaiting the decision of the Supreme Court in *Swann*. Before *Swann* was decided, however, the parties were engaged in an attempt to develop a novel method of desegregating the Richmond school system for which there was not at the time legal precedent. Nor can it be said that there was not some remaining confusion, at least at the District level, about the scope of *Swann* itself.[38] The frustrations of the District Court in its commendable attempt to arrive at a school plan that would protect the constitutional rights of the plaintiffs and others in their class, are understandable, but, to some extent, the School Board itself was also frustrated. It seems to un unfair to find under these circumstances that it was unreasonably obdurate.

II.

The District Court enunciated an alternative ground for the award it made. It concluded that school desegregation actions serve the ends of sound public policy as expressed in Congressional acts and are thus actually public

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[37] See, *Local No. 149 I.U., U.A., A. & A.I.W.* v. *American Brake Shoe Co.* (4th Cir. 1962), 298 F.2d 212, 216, cert. den. 369 U.S. 873, 82 S. Ct. 1142, 8 L. Ed. 2d 276.

In *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967), it was stated that "a police officer is not charged with predicting the future course of constitutional law." By like token, it would seem a school board should not be required, under penalty of being charged with obdurateness and being saddled with onerous attorneys' fees, to anticipate or predict the future course of "constitutional law" in the murky area of school desegregation.

[38] See, *Winston-Salem/Forsyth County Board of Education* v. *Scott*, opinion of Chief Justice Burger, dated August 31, 1971, —— U.S. ——.

actions, carried on by "private-attorneys general", who are entitled to be compensated as a part of the costs of the action. Specifically, it held that "exercise of equity power requires the Court to allow counsels' fees and expenses, in a field in which Congress has authorized broad equitable remedies 'unless special circumstances would render such an award unjust.'" [39] Apparently, though, the District Court would limit the application of this alternative ground for the award to those situations where the rights of the plaintiff were plain and the defense manifestly without merit. This conclusion follows from the fact that the Court finds this right of an award only arose in 1970 and 1971, when it might be presumed from previous expressions in the opinion, the Court concluded that all doubts about how to achieve a non-racial unitary school system had been resolved, and any failure of a school system to inaugurate such a system was obviously in bad faith and in defiance of law. That follows from this statement made by way of preface to its exposition of its alternative ground:

> "Passing the question of the appropriateness of allowing fees on the basis of traditional equitable standards, the Court is persuaded that in 1970 and 1971 the character of school desegregation litigation has become such that full and appropriate relief must include the award of expenses of litigation. This is an alternative ground for today's ruling." [40]

If this is the basis for the Court's alternative ground, it really does not differ from the rule that has heretofore

[39] See 53 FRD at p. 42.

[40] See, 53 FRD at p. 41.

been followed consistently by this Court that, where a defendant defends in bad faith or in defiance of law, equity will award attorney's fees. The difficulty with the application of the Court's alternative ground for an award on this basis, though, is its assumption that by 1970 the law on the standards to be applied in achieving a unitary school system had been clearly and finally determined. As we have seen, there was no such certainty in 1970; indeed it would not appear that such certainty exists today. And it is this very uncertainty that is the rationale of the decision in *Kelly* v. *Guinn* (9th Cir. 1972), 456 F.2d 100, 111, where the Court, citing both the District Court's opinion involved in this appeal (53 FRD 28), and *Lee* v. *Southern Home Sites Corp.* (5th Cir. 1970), 429 F.2d 290, 295-296,[41] sustained a denial of attorney's fees in a school integration case, because:

> "First, there was substantial doubt as to the school district's legal obligation in the circumstances of this case; the district's resistance to plaintiffs' demands rested upon that doubt, and not upon an obdurate refusal to implement clear constitutional rights. Second, throughout the proceedings the school district has evinced a willingness to discharge its responsibilities under the law when those duties were made clear."

If, however, an award of attorney's fees is to be made as a means of implementing public policy, as the District Court indicates in its exposition of its alternative ground of award, it must normally find its warrant for such action

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[41] See, also, *Lee* v. *Southern Home Sites Corp.* (5th Cir. 1971), 444 F.2d 143.

in statutory authority.[42] Congress, however, has made no provision for such award in school desegregation cases. Legislation to such effect, included in a bill to assist in the integration of educational institutions, was introduced in 1971 in Congress but it was not favorably considered. Moreover, in the Civil Rights Act of 1964, it expressly provided for such award in both the equal employment opportunity[43] and the public accommodations sections[44] but pointedly omitted to include such a provision in the public education section.[45] In giving effect to this contrast in the several titles of the Civil Rights Act of 1964, and in affirming that any award of attorney's fees in a school desegregation case must be predicated on traditional equitable standards, the Court in *Kemp* v. *Beasley* (8th Cir. 1965), 352 F.2d 14, 23, said:

> "Congress by specifically authorizing attorney's fees in Public Accommodation cases and not making allowance in school segregation cases clearly indicated that insofar as the Civil Rights Act is concerned, it does not authorize the sanction of legal fees in this type of action. The doctrine of *Expressio unium est exclusio alterius* applies here and is dispositive of this contention."

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[42] See *Fleischmann* v. *Maier Brewing Co.* (1967), 386 U.S. 714, 717, 87 S. Ct. 1404, 18 L. Ed. 2d 475; see, also, *Brewer* v. *School Board of City of Norfolk, Virginia, supra,* note 22, at p. 950.

[43] See, Section 2000 e-5(k), 42 U.S.C.

[44] See, Section 2000 a-3(b), 42 U.S.C.

[45] Section 2000 c-7, 42 U.S.C.; and see, *United States* v. *Gray* (D.C. R.I. 1970), 319 F. Supp. 871, 872-3. See, however, Note 57, post.

The same conclusion was reached in *Monroe* v. *Board of Com'rs. of City of Jackson, Tenn.* (6th Cir. 1972), 453 F.2d 259, 262-3, note 1, where an award though sustained, was sustained on the ground of "unreasonable, obdurate obstinacy" as enunciated in *Bradley* v. *School Board of Richmond, Virginia* (4th Cir. 1965), 345 F.2d 310, 321, and not as a vehicle for the enforcement of public policy. To the same effect is *United States* v. *Gray, supra.*

It is suggested that *Mills* v. *Electric Auto-Lite* (1970), 396 U.S. 375, 90 S. Ct. 616, 24 L. Ed. 2d 593, and *Lee* v. *Southern Home Sites Corp.* (5th Cir. 1971), 444 F.2d 143, sustain this alternative award as in the nature of a sanction designed to further public policy. Any reliance on *Mills* is "misplaced, however, because conferral of benefits, not policy enforcement, was the *Mills* Court's stated justification for its holding." 50 *Tex. L. Rev.* 207 (1971).[46] In fact, the award in *Mills* was based on the same concept of benefit as was used to support the award in *Trustees* v. *Greenough* (1881), 105 U.S. 527. 36 *Mo. L. Rev.* 137 (1971). Equally inapposite is *Lee.* Though filed under Section 1982, it was like unto, and, so far as relief was concerned, should be treated similarly as an action under Section 3612(c), 42 U.S.C., in which attorney's fees are allowable.[47] By this

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[46] See, also, *Kahan* v. *Rosenstiel* (3d Cir. 1970), 424 F.2d 161, 166:

"In the *Mills* opinion, Justice Harlan noted that the plaintiffs' suit *conferred a benefit* on all the shareholders * * *." (Italics added.)

[47] See, particularly note 2, p. 147, 444 F.2d.

This case has been criticized in 50 *Tex. L. Rev.* 207. Thus, it finds untenable its attempt to identify its award with the statutory authorization provided in Section 3612(c), because, "Under the latter statute (section 3612) the court may not award attorney's fees to a plaintiff financially able to pay his own fees." (Page 208).

reasoning, the Court sought to bring the award within the umbrella of a parallel specific statutory authorization.[48] There is no basis for such a rationale here.

If, however, the rationale of *Mills* is to be stretched so as to provide a vehicle for establishing judicial power justifying the employment of award of attorney's fees to promote and encourage private litigation in support of public policy as expressed by Congress or embodied in the Constitution, it will launch courts upon the difficult and complex task of determining what is public policy, an issue normally reserved for legislative determination, and, even more difficult, which public policy warrants the encouragement of award of fees to attorneys for private litigants who voluntarily take upon themselves the character of private attorneys-general.[49] Counsel in environmental cases would claim such a role for their services.[50] The protection of historical houses and monuments against the encroachment of highways has been cloaked within the mantle of public interest and it would be argued should receive the encouragement of an award.[51] Consumers' suits are

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[48] *Knight* v. *Auciello* (1st Cir. 1972), 453 F.2d 852, is a similar case, involving discrimination proscribed by Section 1982, 42 U.S.C.

[49] See, Note, *The Allocation of Attorney's Fees After Mills* v. *Electric Auto-Lite Co.*, 38 *University of Chicago L. Rev.* 316, at pp. 329-30 (1971).

[50] See, Section 4332(2), et seq., 42 U.S.C.; *Environmental Defense Fund* v. *Corps of Eng. of U. S. Army* (D.C. Ark. 1971), 325 F. Supp. 749; *Environmental Defense Fund, Inc.* v. *Corps of Engineers* (D.C. D.C. 1971), 324 F. Supp. 878; *Businessmen Affected Severely, etc.* v. *D.C. City Council* (D.C. D.C. 1972), 339 F. Supp. 793.

[51] See, Section 461, 16 U.S.C., and Section 4331(b)(4), 42 U.S.C.; *West Virginia Highlands Conserv.* v. *Island Creek Coal Co.* (4th Cir. 1971), 441 F.2d 232; Cf., *Ely* v. *Velde* (D.C. Va. 1971), 321 F. Supp. 1088.

clearly to be considered.[52] Apportionment suits justify awards under this theory.[53] First Amendment rights are often spoken of as preferred constitutional rights. Attacks upon statutes infringing free speech would, under this theory, command an allowance. But it must be emphasized that whether the enforcement of Congressional purpose in all these cases commands an award of attorney's fees is a matter for legislative determination. And Congress has not been reticent in expressing such purpose in those cases where it conceives that such special award is appropriate. In many instances, where Congress has enacted statutes designed to further public purpose, it has bulwarked their enforcement with provisions for the allowance of counsel fees to attorneys for private parties invoking such statutes; in other cases it has denied such awards.[54] In some of the statutes authorizing such allowances, the award is, as in the statute involved in *Newman* v. *Piggie Park Enterprises* (1968), 390 U.S. 400, 88 S. Ct. 964, 19 L. Ed. 2d 1263, either mandatory or practically so; in others it is discretionary[55] and the granting of awards is generally made through the use of the same guidelines as motivate courts in making awards under the traditional equity rule. Should the courts, in those in-

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[52] See, 38 *University of Chicago L. Rev.* 316.

[53] Actually, an alternative award has been made in such a case. *Sims* v. *Amos* (3-judge ct. Ala. 1972), —— F. Supp. —— (filed March 17, 1972).

[54] See Annotation, 8 L. Ed. 2d 894, at pp. 922-32, for a listing of statutes authorizing an award of attorney's fees. To this list should be added Section 1640, 15 U.S.C. (Truth-in-Lending Act).

[55] See, for instance, Section 153, 43 U.S.C.; *United Transportation Union* v. *Soo Line RR Co.* (7th Cir. 1972), 457 F.2d 285.

stances where Congress has failed to grant the right, review the legislative omission and sustain or correct the omission as the court's judgment on public policy suggests? This, it seems to us, would be an unwarranted exercise of judicial power. After all, Courts should not assume that Congress legislates in ignorance of existing law, whether statutory or precedential. Accordingly, when Congress omits to provide specially for the allowance of attorney's fees in a statutory scheme designed to further a public purpose, it may be fairly accepted that it did so purposefully, intending that the allowance of attorney's fees in cases brought to enforce the rights there created or recognized should be allowed only as they may be authorized under the traditional and long-established principles as stated in *Sprague* v. *Ticonic Bank* (1939), 307 U.S. 161, 166, 59 S. Ct. 777, 83 L. Ed. 1184. Such consideration, it would seem, was the compelling reason that prompted one commentator to offer the apt *caveat* that the determination of public policy as a predicate for such awards should be more safely left with Congress and not undertaken by the Courts. Thus, in 50 *Tex. L. Rev.* 209 (1971), it is stated:

> "The decision, (referring to *Lee*) however, sanctions excessive judicial discretion that may emasculate the general rule against fee awards and inject more unpredictability into the judicial process. The legislature should formulate a rule that would promote predictability and utilize the power inherent in fee allocation to pursue the goals it desires to achieve, one of which would be equal access to the courts."

Even the author of the Note, *The Allocation of Attorney's Fees After Mills* v. *Electric Auto-Lite Co.*, 38 *University*

of Chicago L. Rev., 316, though sympathetic to the extension of *Mills* to cover awards of attorney's fees in support of public policy, recognizes that a general policy, applicable to all cases, on the award of attorney's fees should be adopted, concluding its review of the subject with this comment:

> "Logically, one of two things must happen: either judicial discretion to grant fees on policy grounds will result in universal fee shifting from the successful party, or the courts will withdraw to the traditional position, denying any fee transfer without specific statutory authorization. *Mills* represents an uneasy halfway house between these two extremes." (Page 336)

We find ourselves in agreement with the conclusion that if such awards are to be made to promote the public policy expressed in legislative action, they should be authorized by Congress and not by the courts.[56] This is especially true in school cases, where the guidelines are murky and where harried, normally uncompensated School Boards must tread warily their way through largely uncharted and shadowy legal forests in their search for an acceptable plan providing what the courts will hopefully decide is a unitary school system.

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[56] It is interesting that in all the cases where the right to make an award for policy reasons has been stated, it has been stated simply as an alternative ground to a finding of unreasonable obduracy. See, 53 FRD at pp. 39-42, and *Lee, supra*, at p. 144. In *Sims, supra*, at p. ——, the Court found that, "The history of the present litigation is replete with instances of the Legislature's neglect of, and even total disregard for, its constitutional obligation to reapportion." In short, no court has yet predicated an award exclusively upon the promotion of public policy.

Accordingly, until Congress authorizes otherwise awards of attorney's fees in school desegregation cases must rest upon the traditional equitable standards as stated in *Bradley* v. *Richmond School Board* (4th Cir. 1965), 345 F.2d 310, which provide ample scope for the award in appropriate cases.

III.

After the above opinion had been prepared but not issued, the Congress enacted Section 718 of the Emergency School Aid Act. The appellees promptly called to the Court's attention this Section, suggesting that it provided an alternative basis for the award made. They construed the reference in the Section to "final order" to embrace any appealable order dealing with any issue raised in a school desegregation case. Any order which had been appealed and was pending on appeal, unresolved, on the effective date of the Section (i.e., July 1, 1972), they argued, could provide a proper vehicle for an award under the Section.[56a]

Since this issue of the application of Section 718 was raised simultaneously in a number of other pending appeals, it was determined to withhold the above opinion for the time being, and to consider *en banc* the reach of

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[56a] During the course of the oral argument counsel for the appellees was asked to define the term "final order" as used in Section 718. His reply was,

> "* * * there is mention of final order in the legislative material—they use that term rather than a final judgment because in recognition of the peculiar nature of school cases,—that is you may have a wave of litigation that would end up in a final decision by this court or the Supreme Court and then the case would again be relitigated later—that order which is appealable is a final order."

Section 718, as applied both to this case and to the other related appeals. Such *en banc* hearing has been had and the Court has concluded that Section 718 does not reach services rendered prior to June 30, 1972.[57]

Were it to be construed as extending to any "final order", entered as "necessary to secure compliance", and pending unresolved on the effective date of the Act (which is the plaintiffs' construction of the sweep of the Section), such Section could not be used as a vehicle to validate this award. This is so because there was no "final order" pending unresolved on appeal on June 30, 1972, to which this award could attach. The only proceeding pending unresolved in this case on May 26, 1971, when the District Court issued its order allowing attorney's fees, was the action begun on motion of the School Board itself to require the merger of the Richmond schools with those of the contiguous counties of Chesterfield and Henrico. All orders issued prior to that date in this desegregation action had long since become final and were not pending on appeal either on May 26 or on the date Section 718 became effective. Thus, on August 17, 1970, the District Court had approved the School Board's interim plan for the school year 1970-1. There was no appeal perfected from that order. The plaintiffs had moved on December 9, 1970 for additional relief but that motion had been denied by an order dated January 29, 1970, which, incidentally, was the same date used by the District Court for the cut-off of its allowance of attorney's fees. Again, there was no

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[57] *James* v. *The Beaufort County Board of Education* (72-1065); *Copeland, et al.* v. *School Board of the City of Portsmouth, Virginia, et al.* (Nos. 71-1993 and 71-1994); *Thompson* v. *The School Board of the City of Newport News, Virginia, et al.* (Nos. 71-2032 and 71-2033), filed October ——, 1972.

appeal from that order dismissing plaintiffs' application for relief, and, even if it be assumed that plaintiffs' attorneys are to be granted attorneys' fees when they do not prevail (an assumption clearly not permitted under the language of Section 718), the proceeding under which that order was entered was not pending when Section 718 became effective.[58] To restate: The only proceedings pending undetermined by an order that had not become final on the date Section 718 became effective was the action begun by the School Board and resulting in the order of the District Court dated January 10, 1972.[59] That order, which, it may be assumed, is still pending since the School Board is presently seeking certiorari, was reversed by this Court[60] and, unless the decision of this Court is in turn reversed, it will not support any allowance of attorneys' fees, since Section 718 authorizes allowance only when plaintiffs have prevailed.

REVERSED.

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[58] It is true that on January 29, 1971, the School Board submitted to the District Court its proposed plan for the operation of the Richmond schools for the school year 1971-2. There seems to have been either no dispute over this plan or the proposal was swallowed up in the more expansive merger action.

[59] 338 F. Supp. 67.

[60] 462 F.2d 1058.

Opinion of United States Court of Appeals in Bradley Action

WINTER, *Circuit Judge,* dissenting:

The in banc court holds that this case is not governed by § 718 of Title VII, "Emergency School Aid Act," of the Education Amendments of 1972. P.L. 92-318; 86 Stat. 235; 1972 U.S. Code and Admin. News 1908, 2051. The panel concludes both that the Richmond School Board was not guilty of "unreasonable, obdurate obstinacy" and that plaintiffs were not entitled to recover counsel fees under the private attorney general concept. On all issues, I would conclude otherwise and I therefore respectfully dissent.

I.

Because I conclude not only that § 718 is applicable to this litigation, but also that, as a matter of statutory construction, its terms are met, I place my dissent from the panel's decision primarily on that ground. If, however, § 718 is treated as inapplicable to this case, I would affirm the district court, preferably on my concurring views in *Brewer* v. *School Board of City of Norfolk, Virginia,* 456 F.2d 943, 952-54 (4 Cir. 1972) cert. den. —— U.S. —— (1972). Even if the obdurate obstinacy test controls, I would still affirm. As I read the record, I can only conclude that for the period for which an allowance of fees was made, the Richmond School Board was obdurately obstinate. Commendably, it seized the initiative in vindicating plaintiffs' rights by seeking to sustain a consolidation of school districts; but this was a latter-day conversion that occurred after the district court suggested that consolidation be explored. Until that time the record reflects the Board's stubborn reluctance to implement Brown I (Brown v. Board of Education, 347 U.S. 483 (1954) in the light of Green v. County School Board of New Kent

County, Va., 391 U.S. 430 (1968); Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969); Carter v. West Feliciana Parish School Board, 396 U.S. 226 (1969); and, while the litigation was progressing, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). The history of the litigation, as set forth in the opinion of the district court, is sufficient to prove the point. Bradley v. School Board of City of Richmond, Virginia, 53 F.R.D. 28, 29-33 (E.D. Va. 1971).

II.

I turn to the more important questions of the scope and application of § 718. Neither in the instant case, nor in James v. The Beaufort County Board of Education, —— F.2d —— (4 Cir. decided simultaneously herewith), does the majority articulate in other than summary form why § 718 should not apply to cases pending on its effective date (July 1, 1972). I conclude that it does apply, and in the face of the majority's silence, I must discuss the pertinent authorities at some length.

The text of § 178 is set forth in the margin.[1] Its enactment presents no question of retroactive application to this

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Attorney Fees

[1] Sec. 718. Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

litigation. As I shall show, the issue of the allowance of counsel fees has been an issue throughout every stage of the proceedings; and the proceedings were not terminated when § 718 became effective on July 1, 1972, because this appeal was pending before us. This is not a case where a subsequent statute is sought to be applied to events long past and to issues long finally decided. Rather, it is a case which presents the concurrent application of a statute to an issue still in the process of litigation at the time of its enactment. United States v. Schooner Peggy, 1 Cranch 103 (1801), and Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969), are the significant controlling authorities.

In *Peggy*, while an appeal was pending from a decision of the lower court in a prize case, the United States entered into a treaty with France, which if applicable would have required reversal. The treaty explicitly contemplated that it would be applicable to seizures that had taken place prior to the treaty's ratification where litigation had not been terminated prior to ratification. On the basis of the new treaty, the Supreme Court reversed the decision of the lower court. In the opinion of Mr. Justice Marshall, it was said:

> It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, . . . I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction

> which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction confirming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

United States v. Schooner Peggy, supra, 1 Cranch at 109.

Peggy may be interpreted in two ways: Under a narrow interpretation the Court held only that, where the law changes between the decision of the lower court and an appeal, the appellate court must apply the new law if, by its terms, it purports to be applicable to pending cases. The decisional process, under this interpretation, requires the appellate court to examine the intervening law and to determine whether it was intended to apply to factual situations which transpired prior to the law's enactment. Since the treaty in *Peggy* explicitly applied to situations where the controversy was still pending, it followed that the statute should be applied in deciding the case. Certainly the facts of *Peggy* and much of the language of the opinion of Mr. Justice Marshall support this interpretation.

By a broader interpretation, *Peggy* may be considered to hold that where the law has changed between the occurrence of the facts in issue and the decision of the appel-

late court and where the controversy is still pending, the appellate court must apply the new law, unless there is a positive expression that the new law is not to apply to pending cases. This is the interpretation of *Peggy* which found its final expression in *Thorpe*. But before turning to *Thorpe* it is well to consider intervening decisions.

In Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941), the Court held that a federal appellate court in exercising diversity jurisdiction must follow a state court decision which was subsequent to and contradicted the district court decision. In Carpenter v. Wabash Ry. Co., 309 U.S. 23 (1940), the Court held that the appellate court must apply an intervening federal statute where the case is pending on appeal. However, in *Carpenter*, the statute explicitly indicated that it was to apply to pending cases. In United States v. Chambers, 291 U.S. 217 (1934), the Court held that indictments returned pursuant to the eighteenth amendment, and before the adoption of the twenty-first amendment, must be dismissed after passage of the twenty first amendment even though the acts when committed were crimes. See also Ziffrin v. United States, 318 U.S. 73 (1943). Then, in Linkletter v. Walker, 381 U.S. 618 (1965), the Court drew a firm distinction between those cases where an appeal is still pending and those that are final ("where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed . . . ," 381 U.S. at 622, n. 5). The Court held that Mapp v. Ohio, 367 U.S. 643 (1961), applied to pending cases but not to final cases. It discussed the previous decisions to which reference has been made and concluded that "[u]nder our cases . . . a change in law will be given effect while a case is on direct review.

. . ." 381 U.S. at 627. It should be noted, however, that the Court was by no means consistent in applying this rule after *Linkletter*. See Desist v. United States, 394 U.S. 244, 256-60 (1969) (Harlan, J., dissenting).

In *Thorpe*, the Housing Authority gave the tenant notice to vacate in August, 1965, but refused to give its reasons for the notice. When the tenant refused to vacate, the Authority brought an action for summary eviction in September, 1965, and prevailed. Actual eviction, however, was stayed during the pendency of the litigation. In 1967, before the Supreme Court decided the case, the Department of Housing and Urban Development issued a circular directing that tenants must be given reasons for their eviction. The Supreme Court held that housing authorities must apply the HUD circular "before evicting any tenant still residing in such projects on the date of this decision." 393 U.S. at 274. Relying on *Peggy*, it explained that "[t]he general rule . . . is that an appellate court must apply the law in effect at the time it renders its decision," although it recognized that "[e]xceptions have been made to prevent manifest injustice. . . ." 393 U.S. at 281-82.

The difference between *Thorpe* and *Peggy* is that the HUD circular did not indicate that it was to be applied to pending cases or to facts which had transpired prior to its issuance. Indeed, the circular stated that it was to apply "from this date" (the date of issuance). 393 U.S. at 272, n. 8. Thus, *Thorpe* held that even where the intervening law does not explicitly or implicitly contemplate that it would be applied to pending cases, it, nevertheless, must be applied at the appellate level to decide the case. The line of cases from *Peggy* to *Thorpe* dictates the application of § 718 in the instant case, irrespective of legis-

lative intent. Simply stated, since the law changed while the case (the lawyers' fees issue) was still pending before us, the new law applies.

The School Board contends that *Thorpe* does not erase the long-standing rule of construction favoring prospective application. It argues that *Thorpe* did not present a retroactivity question since the tenant had not yet been evicted. It places great reliance on the "tenant still residing" language in the opinion. The School Board concludes that since the tenant had not yet been evicted, the HUD circular was not retroactively applied but was currently applied to a still pending eviction. With respect to the legal services in issue in the instant case, the Board argues that the *Thorpe* rule does not apply since the performance of legal services was a completed act prior to the effective date of § 718.

While the Board's premise regarding the interpretation of *Thorpe* may not be faulted, its analogy is inapt and its conclusion incorrect. True, the rendition of legal services in the instant case had been completed (except for legal services on appeal), but the dispute over who was liable for payment was very much alive, as alive as the dispute over eviction in *Thorpe*. The proper analogy is not between rendition of legal services and the eviction litigation, but between rendition of legal services and the Housing Authority's termination of the lease and notice to vacate. These are the completed acts. What lingers is the dispute over who is right, and it lingers in both cases. Therefore, as in *Thorpe*, here there is no retroactivity issue. *Thorpe* governs and § 718 applies unless it is rendered inapplicable because one or more of its provisions has not been

met. See Bassett v. Atlanta Independent School Dist. No. 1550 (E.D. Tex. August 28, 1972).[3]

III.

Since *Thorpe* governs, legislative history is not relevant, unless it unequivocally shows an intention on the part of Congress that the statute not apply to live issues in currently pending cases. The legislative history of § 718 provides no such expression of intent. To the extent that it proves anything, it supports the conclusion that § 718 should apply to live issues in currently pending cases.

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[3] It must be recognized that there are some discordant notes in the case law: In Soria v. Oxnard School Dist. Board, —— F.2d —— (9 Cir. August 21, 1972), it was held, in a per curiam opinion, that § 803 of the Education Amendments of 1972, which postponed the effectiveness of busing orders for the purpose of achieving racial balance until all appeals have been exhausted, had no application to a case pending at the time of its effective date in which busing, pursuant to an integration plan, is already in operation. There is no mention, however, of *Thorpe*.

In Greene v. United States, 376 U.S. 149 (1964), the Court refused to apply an intervening Department of Defense regulation to a pending case, reasoning in retroactivity language. But this case was obviously one where "retroactivity" would work "manifest injustice." See *Thorpe*, *supra* at 282 n. 43. Cases construing the Criminal Justice Act, 18 U.S.C.A. § 3006A (1970), which provides court-appointed attorneys with fees from federal funds have held that it applies only where counsel was appointed after the Act, or at least, only where counsel's assistance was rendered after the Act. Compare United States v. Pope, 251 F.S. 331 (D. Neb. 1966) with United States v. Dutsch, 357 F.2d 331 (4 Cir. 1966)); United States v. Thompson, 356 F.2d 216 (2 Cir. 1965) cert. den. 384 U.S. 964 (1966); Dolan v. United States, 351 F.2d 671 (5 Cir. 1965) (per curiam). But that Act involved expenditures of federal appropriations which, by the terms of the Act, would not become effective until a year after enactment, so that it may be fairly said that there was a clear legislative intention not to make the terms of the Act applicable to pending cases.

Two clauses of § 718 bear on the issue. As originally proposed and reported, § 718 provided for a federal fund of $15 million from which counsel would be paid "for services rendered, and the costs incurred, after the date of enactment . . ." S. 683, § 11 (Quality Integrated Education Act). The Senate Committee on Labor and Public Welfare reported the bill, with this clause intact, as § 1557. Sen. Rep. No. 92-61. 92nd Cong. 1st Sess. pp. 55-56.

The School Board places great stress on this language as indicating a strictly prospective legislative intent. It fails to point out, however, that the federal funding, as well as the "after the date" clause, were deleted by floor amendment prior to the passage of the Act. This floor amendment can be construed to indicate that Congress' ultimate intent was indeed the opposite of that urged by the Board. The "after the date" clause and federal funding seem to have gone in tandem. Given the nature of federal appropriation, prospective application would be a sensible requirement. Compare Criminal Justice Act, 18 U.S.C.A. § 3006A (1970). By the deletion of federal funding, the reason for restricting payment of attorneys' fees for services performed after the date of enactment disappeared.

Secondly, the School Board points to the language in the committee report which refers to "additional efforts," but the sentence is phrased in the conjunctive. It reads: "$15 million is set aside *for additional efforts* under this bill and under Title I of the Elementary and Secondary Education Act of 1965 * * * *and for* vigorous nation-wide enforcement of constitutional and statutory protection against all forms of discrimination" (emphasis added). Whether "additonal efforts" modifies everything that follows, or

just what precedes the conjunction "and", is debatable and a rather unenlightening inquiry.

Thus, nothing on the face of § 718, or in its legislative history, conclusively manifests a congressional desire that the *Thorpe* rule applying new legislation to live issues in pending litigation should not prevail. I turn to the question of its precise application.

IV.

Section 718 empowers the court to award counsel fees "in its discretion, upon a finding that the proceedings were necessary to bring about compliance. . . ." The private attorney general rule of Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968), governs the court's discretion. Under the *Piggie Park* standard, the court should award counsel fees "unless special circumstances would render such an award unjust." 390 U.S. at 402. See Lea v. Cone Mills Corp., 438 F.2d 86 (4 Cir. 1971). The language of § 718 is substantially similar to the counsel fee provisions in § 204(b) of Title II and § 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000a-3(b), 2000e-5(k), and § 812(c) of Title VIII of the Civil Rights Act of 1968, 42 U.S.C.A. § 3612(c), all of which are governed by *Piggie Park*. Moreover, the legislative history of § 718 reveals that its purpose is the same as the counsel fee provisions in Titles II, VII, and VIII. 117 Cong. Rec. S. 5484, 5490 (Daily Ed. April 22, 1921); *id.* S. 5537 (Daily Ed. April 23, 1971). The additional standard in § 718 requiring the court to find that the suit was necessary to bring about compliance does not modify the *Piggie Park* standard, because its purpose, as revealed by the legislative history, is to deter champertous

claims and the unnecesary protraction of litigation. 117 Cong. Rec. S. 5485, 5490-91 (Daily Ed. April 22, 1971). In the instant case, the district court found that suit was necessary to bring about compliance and it also found, at least implicitly, that there were no exceptional circumstances which would render an award of counsel fees against the School Board unjust. These findings are not clearly erroneous and hence counsel are entitled to some allowance of fees under § 718 as construed by *Piggie Park*.

V.

Although § 718 should be applied to legal services, whenever rendered, in connection with school litigation culminating in an order entered after its effective date (July 1, 1972), § 718 will not support affirmance of the precise award made by the district court in this case. It would, however, support a larger award to compensate for legal services rendered over a longer period.

The district court's award was for legal services rendered from March 10, 1970, the date when plaintiff filed a motion for further relief because of the decisions in *New Kent County*, supra, *Alexander*, supra, and *Carter*, supra, to January 29, 1971, the date on which the district court declined to implement plaintiff's plan. Manifestly, the entry of that order cannot support an award of counsel fees for services to the date of its entry because the order did not grant relief to the parties seeking to recover fees—a condition precedent to the award of fees as set forth in § 718. But, a recitation of the history of the litigation shows that counsel fees should be awarded for all legal services rendered from March 10, 1970 to April 5, 1971, the date on which the district court entered an order

approving the plan under which the Richmond schools are presently being operated, and thereafter for legal services rendered in this appeal.

The essential dates in the history of the litigation follow: The motion for further relief was filed March 10, 1970. Appended thereto was an application for an award of reasonable attorneys' fees. After admitting that its schools were not then being constitutionally operated, the Board filed a plan (Plan 1) to bring the operation of the schools into compliance with the Constitution. After hearings, the district court disapproved Plan 1 (June 26, 1970) and directed the preparation and filing of a new plan. Plan 2 was filed July 23, 1970, and hearings were held on it. It, too, was disapproved as an inadequate long-range solution. But, because there was insufficient time to prepare, file and consider another plan before the beginning of the next school term, Plan 2 was ordered into effect on August 17, 1970, for the term commencing August 30, 1970, and the Board was also ordered to make a new submission. The Board appealed from the order implementing Plan 2 and obtained a delay in briefing from this court. The appeal was never heard, because, having been effectively stayed, it was rendered moot by later orders. Before Plan 3 was filed, plaintiffs sought further relief for the second semester of the 1970-71 school year, but Plan 3 was filed (January 15, 1971) before they could be heard and their motion was denied on January 29, 1971, the terminal date for the allowance of compensation in the order appealed from. Plan 3 contained three parts—it was a restatement of Plans 1 and 2, and it contained a new third proposal. The Board urged the adoption of the Plan 2 aspect of Plan 3; but, on April 5, 1971, the district court ordered

into effect for the 1971-72 school year the new third proposal. This is the plan under which the Richmond schools are presently operating.[3]

To this summary there need only be added that on August 17, 1970, the district court ordered the parties to confer on the subject of counsel fees. Plaintiffs filed on March 5, 1971, a memorandum in support of their request for an allowance; the court, on March 10, 1971, ordered that further memoranda and evidentiary materials with regard to the motion for counsel fees be filed; and these were filed on March 15, 1971. The order directing the payment of counsel fees was entered May 26, 1971, after the entry of the order approving and implementing Plan 3.

The majority concludes that § 718 was rendered inapplicable because the order appealed from was entered May 26, 1971, a date on which there was no "final order" entered as "necessary to secure compliance." This conclusion seems to me to be overly technical and not in accord with the facts.

The request for counsel fees was made when the motion for additional relief was filed on March 10, 1970. While very much alive throughout the proceedings, properly, the motion was not considered until the district court could approve a plan for a unitary system of schools for Richmond which was other than an interim plan. That approval was forthcoming on April 5, 1971, and promptly thereafter the district court addressed itself to the question of

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[3] Of course, there were even still further proceedings culminating in an order to consolidate the Richmond, Henrico County and Chesterfield School Districts, but this court set that order aside in Bradley v. The School Board of the City of Richmond, Virginia, —— F.2d —— (4 Cir. June 5, 1972), application for cert. filed October —, 1972.

allowance of counsel fees. The approval of a permanent plan was not easily arrived at. Because the proposals of the Richmond School Board were constitutionally unacceptable, except on an interim basis, this approval was arrived at in several steps: (a) disapproval of Plan 1, (b) interim approval of Plan 2, (c) disapproval of additional interim relief, and (d) approval of Plan 3.

Certainly, § 718 is not to be so strictly construed that any counsel fees allowable thereunder must be allowed the very instant that an order granting interim or permanent relief is entered. A request for fees may present difficult questions of fact and require the taking of evidence. The burden of deciding these questions should not be added to the simultaneous burden of deciding the often very complex question of what is a constitutionally acceptable desegregation plan; rather, the issues should be severed and the question of counsel fees decided later so long as the issue of counsel fees had been present throughout the litigation and has not been raised as an afterthought after the school desegregation plan has become final. These practical considerations, plus the fact that every stage in the proceedings has been a part of an overall transition from unconstitutionally operated schools in Richmond to constitutionally operated schools, lead me to the conclusion that the exact terms and conditions of § 718 have in the main been met.

While I therefore conclude that there was a sufficient nexus between the request for counsel fees and the entry of a final order necessary to obtain compliance with the Constitution so as to warrant invoking § 718, I think that § 718 requires that the district court redetermine the allowance. As previously stated, the district court made an

allowance for services to the date that plaintiffs' request for additional interim relief was denied. If the various steps for arriving at an overall desegregation plan for Richmond are severed, § 718 would not permit an allowance for services leading to the order of January 29, 1971, since on that date plaintiffs were denied the additional interim relief they prayed and § 718 permits an allowance only to the prevailing party. However, plaintiffs would be entitled to an allowance for services beyond January 29, 1971, up to April 5, 1971, the date of approval of Plan 3, because on that date they became the prevailing party and they obtained an order, still in effect, which required the schools of Richmond to be operated agreeably to the Constitution. I would therefore vacate the judgment and remand the case for a redetermination of the amount of the allowance—in short, I would require that counsel be compensated for their services to and including April 5, 1971 and also their services on appeal in this case.